Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DOUG ELDER AND MARK CLARK, individually and as representatives of the general membership of Houston Police Officers Association and all Class a Police Officers Holding the Rank of Police Officer and Sergeant of Police,

Petitioners,

v.

CITY OF HOUSTON and DOROTHY A. EDWARDS, AFRO-AMERICAN POLICE OFFICERS LEAGUE, THE HOUSTON POLICE ORGANIZATION FOR SPANISH SPEAKING OFFICERS, LIONEL AARON, BENNIE CONWAY, CLEMENT BOYD CROSBY, JR., JOSE GARCIA, JR., RICHARD C. GARCIA, MARIA L. GUILLORY, ANTHONY R. JAMMER, CHARLES A. MCCLELLAND, SILAS MONTGOMERY, JR., CLYDE PHILPOTT, CARL WAYNE REED, RICHARD M. SPENCER, and BRUCE D. WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Relief provided to minority workers to address past disparate impact must be narrowly tailored and serve a compelling governmental purpose. The question presented here is whether the relief granted by the District Court and affirmed by the Court of Appeals was sufficiently narrow to not harm innocent third parties and to comply with the equal protection provisions of the United States Constitution?

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No. 02-

IN THE

Supreme Court of the United States

DOUG ELDER AND MARK CLARK, individually and as representatives of the general membership of Houston Police Officers Association and all Class a Police Officers Holding the Rank of Police Officer and Sergeant of Police,

Petitioners,

v.

CITY OF HOUSTON and DOROTHY A. EDWARDS, AFRO-AMERICAN POLICE OFFICERS LEAGUE, THE HOUSTON POLICE ORGANIZATION FOR SPANISH SPEAKING OFFICERS, LIONEL AARON, BENNIE CONWAY, CLEMENT BOYD CROSBY, JR., JOSE GARCIA, JR., RICHARD C. GARCIA, MARIA L. GUILLORY, ANTHONY R. JAMMER, CHARLES A. MCCLELLAND, SILAS MONTGOMERY, JR., CLYDE PHILPOTT, CARL WAYNE REED, RICHARD M. SPENCER, and BRUCE D. WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Doug Elder and Mark Clark, *et al.*, the Intervenors in the District Court and appellants in the Court of Appeals, petition for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Fifth Circuit in *Dorothy Edwards, et al. v. City of Houston, et al.*, 5th Circuit Docket No. 01-20519 (October 22, 2002)

OPINIONS BELOW

The Court of Appeals opinion is not reported but is reproduced as Appendix A to this petition (hereinafter referred to as Pet. App.).

The District Court's Consent Decree dated March 30, 2001 (filed April 2, 2001) is reproduced as Appendix B. The Court's Findings of Fact on Approval of Consent Decree, dated September 12, 2000, is reproduced as Appendix C. The Court's previous Findings of Fact and Conclusions of Law dated March 25, 1993, adopted in the September 12, 2000, Findings of Fact, is unreported but is reproduced as Appendix D.

STATEMENT OF JURISDICTION

The Court of Appeals judgment was entered on August 19, 2002. On September 3, 2002, a motion for rehearing and motion for rehearing en banc was filed. The Court of Appeals entered an order denying the motion for rehearing and the motion for rehearing en banc on October 22, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000, *et seq.*, as amended by the Civil Rights Act of 1991, and the Equal Protection Clause of the Fourteenth Amendment, United States Constitution.

STATEMENT OF THE CASE

1. This protracted litigation originated with the filing of EEOC charges in 1975 and 1976, alleging that the Houston Police Department discriminated against African-American officers because of their race. Such actions were alleged to violate Title VII of the Civil Rights Act of 1964, as amended. The two cases filed were *Kelley v. Hofheinz,* Civil Action No. H-75-1536 and *Comeaux v. City of Houston*, Civil Action No. 76-H-1754. The two cases were consolidated and referred to as *Kelley*. In 1983, attempts were made to settle the *Kelley* litigation but the settlement discussions were unsuccessful. Almost ten years later, in April 1992, a group of African-American and Hispanic-American officers moved for leave to intervene in *Kelley*. This group alleged that Houston Police Department promotional exams were racially discriminatory. These allegations focused on promotional exams to the ranks of Sergeant and Lieutenant.[1]

2. The City moved to dismiss the *Kelley* case for lack of prosecution. The City also opposed the intervention and suggested that the intervenors should pursue their claims in a new lawsuit limited to the 1991 promotional exams which formed the basis for the underlying EEOC charges.

3. The District Court expressed reservation in allowing claims to reach back to 1975 and the intervenor applicants proposed a compromise to limit claims to those promotional exams given after January 1, 1982. The City would not agree with the compromise.

4. On June 17, 1992, the District Court dismissed the claims in *Kelley* except for the promotional exam related

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1. *See* United States District Court Docket Sheet.

claims after January 1, 1982. The District Court also denied the intervention application and ordered the applicants for intervention to file a new lawsuit. This new lawsuit was then to be transferred to the same Court and consolidated with the remainder of the *Kelley* case creating a new class of Hispanic-American and African-American officers.

5. This new class included Hispanic-American and African-American officers who took promotional exams for the rank of Sergeant from 1982 to present (1992) and those who took such tests in the future. The class also included African-American officers who took a promotional exams for the rank of Lieutenant from 1982 to present (1992). There was no inclusion of Hispanic-American officers who took a lieutenant's exam from 1982 to present (1992) since the City's records did not indicate the exam excluded Hispanic-American officers from promotion to lieutenant. The class also alleged that the discriminatory sergeant's exam delayed their promotion to sergeant and therefore delayed their promotion to lieutenant.[2]

6. During discovery, the City provided promotional exam, support material and identified candidates by race. In the Fall of 1992, settlement discussions began. The case was eventually settled and the Consent Decree, dated February 3, 1993, embodied the settlement and findings of the Court. (Pet. Lodging L-1).

7. The Court provided an opportunity for present and former members of the Houston Police Department to object to the Consent Decree. The Houston Police Officers'

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2. *See Edwards v. City of Houston* case, Civil Action H-92-CV-2510. United States District Court Docket Sheet.

Association (HPOA-later re-incorporated as the Houston Police Officers' Union (HPOU)) sought leave to intervene. The Houston Police Patrolmen's Union (HPPU) also moved to intervene. The Court denied ~~the~~ intervention. The HPOA and the HPPU appealed to the Fifth Circuit.

8. A panel of the Fifth Circuit upheld the District Court's denial of intervention. *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994). The case was then heard en banc by the Fifth Circuit. The en banc court concluded intervention should have been granted. *See Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc).

9. The District Court, on remand, entered an Interim Order allowing the City of Houston to make remedial promotions and regular promotions on an acting basis. The remedial promotions were strikingly similar to the provisions of the earlier Consent Decree except for the acting status. (Interim Order, Pet. Lodging L-45). On March 5, 1997, the HPOU appealed the Court's Interim Order seeking a stay from the Fifth Circuit. The Fifth Circuit expedited the appeal and dismissed the appeal in May of 1997. The District Court then held a fairness hearing (bench trial) on February 3rd, 4th and 5th, 1999.

10. The District Court entered Findings of Fact on Approval of Consent Decree on September 13, 2000, which included the Court's previous findings of fact and conclusions of law filed in March 1993. (Pet. App. C). The Final Consent Decree was entered by the Court on March 30, 2001 (Pet. App. B). Intervenors filed their respective appeals with the Fifth Circuit. A panel of the Fifth Circuit upheld the District Court's Final Consent Decree in an unpublished per curium decision. (Pet. App. A). Motions for rehearing and

for rehearing en banc were filed. The Fifth Circuit denied these motions on October 22, 2002.[3]

Details of the Final Consent Decree

11. The District Court found there was evidence that the promotional exams for the rank of sergeant from 1982 to 1991 produced a racially disparate impact on African-Americans and Hispanic-Americans and the promotional exam for the rank of lieutenant from the same period had a disparate impact on African-Americans. The District Court also found that this disparate impact resulted in a postponement of promotional opportunities for African-Americans and Hispanic-Americans. As a result of evidence presented, the District Court determined that the 1982 to 1991 promotional tests to lieutenant and sergeant were not job-related or there was substantial doubt as to their job-relatedness.

12. As a result of these findings, the District Court ordered 96 remedial promotions to Sergeant and 10 remedial promotions to Lieutenant accompanied by remedial (back dated) seniority. (Pet. App. B (Final Consent Decree), pp. 13a-14a).

13. These remedial promotees were qualified for promotion based upon test scores from the "non-job-related" promotional exams which had formed the basis for the case in the first place. The criteria for selection of remedial promotees was that they must have passed (with a score of 70) at least one promotional exam between 1982 and 1991. (Pet. App. B (Final Consent Decree), pp. 14a-15a).

14. This petition questions the Final Consent Decree and the decision of the Court of Appeals in upholding the actions

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3. *See* Fifth Circuit General Docket Sheet.

of the District Court. The District Court implemented a plan whereby the City of Houston would create 96 sergeant and 10 lieutenant positions over 5 years to address the harm caused by the City's "defective" tests. These 106 positions were filled by Arican-American and Hispanic-American officers.

REASONS FOR GRANTING THE PETITION

15. The Houston Police Department's promotional process which was in effect during the period of time covered by this litigation consisted of a written test score, with additional points for seniority and efficiency rating grades. This process resulted in a rank-ordered list based upon the sum of these different criteria. Officers were promoted off the list in the order they appeared on the rank-ordered list. Such was not the case with the remedial promotees.

16. Even though there may have been an arguable basis for the finding of disparate impact, the relief implemented forced innocent third parties to shoulder the burden for the Houston Police Department's past discriminatory practices. The race based preference embodied in the Final Consent Decree is subject to strict scrutiny under the Fourteenth Amendment. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Strict scrutiny places the relief under the most arduous judicial review, a "most searching review". *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-274 (1989).

17. This standard of review is not focused or dependent upon the race of the individuals burdened or benefitted by a particular classification. *Croson*, *supra*, at 494. In the case at bar, innocent third party officers were burdened by the relief granted. The relief, drafted to address past

discriminatory practices, actually burdened innocent third party officers during the five year implementation period. During that period of time, innocent third party officers who took promotional exams for the ranks of sergeant and lieutenant from 1993 to 1997 faced reduced opportunities for promotion even though the stated position of the Houston Police Department was that the remedial promotees would fill "new" and "extra" promotional positions. Additionally, the officers who "died" at the top of promotional eligibility lists from 1982 to 1991 were bypassed in order to promote African-American and Hispanic-American officers, with lower scores, on their respective lists. This "postponement of promotional opportunities", even though limited and potentially a lesser burden that the burden borne by the minority officers, was the same basis the District Court utilized to justify certain promotions in the Final Consent Decree. (Pet. App. B, pp. 9a-10a).

17. The rights provided under the Equal Protection Clause belong to individuals as their "personal rights". *Croson*, *supra*, at 493. Those individual rights were impermissibly trampled by the relief granted by the District Court which caused the same harm to innocent third parties that the District Court was attempting to address. A less burdensome relief, similar to that granted in *United States v. Paradise*, 480 U.S. 149, 180-182 (1987), would have had the effect of diminishing harm to innocent third parties and addressing the harm caused by the Houston Police Department's past discriminatory practices.[4] Such narrowly

4. The District Court in Paradise ordered a one and one promotion process. In other words, one minority promotion and one non-minority promotion. In the Edwards case, the relief would be to promote one identified minority officer and one innocent third party officer.

tailored relief would address the Title VII concerns and remove the burden shifted to the innocent third parties, thus complying with the Equal Protection Clause. This narrowly tailored relief is within the District Court's equitable relief power (42 U.S.C. § 2000e-5g).

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED AUGUST 19, 2002

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20414

GREGORY P. COUNTIE; ET AL.,

Plaintiffs,

GREGORY P. COUNTIE, RENE CALDERON, MICHAEL MACHA, RICK HOLTSCLAW, NATIVIDAD VASQUEZ, ROBERT C. NELSON, AND CHRIS YORLOFF,

Plaintiffs-Appellants

VERSUS

CITY OF HOUSTON,

Defendant-Appellee.

No. 01-20519

DOROTHY A EDWARDS; AFRO-AMERICAN POLICE OFFICERS LEAGUE; HOUSTON POLICE ORGANIZATION OF SPANISH SPEAKING OFFICERS; LIONEL AARON; BENNIE CONWAY, CLEMENT B CROSBY, JR; JOSE A GARCIA; RICHARD C GARCIA; MARIA L GUILLORY; ANTHONY R JAMMER; CHARLES A MCCLELLAND;

Appendix A

SILAS MONTGOMERY, JR; CLYDE PHILPOTT; CARL WAYNE REED; RICHARD M SPENCER; BRUCE D WILLIAMS,

Plaintiffs-Appellees

VERSUS

CITY OF HOUSTON; ET AL.,

Defendants

CITY OF HOUSTON,

Defendant-Appellee

VERSUS

HOUSTON POLICE PATROLMEN'S UNION, AND THE INDIVIDUAL PEACE OFFICERS IDENTIFIED IN APPENDIX A, an affiliate of the International Union of Police Associations AFL-CIO, Local 109; HARIL WALPOLE; FRANK L ADAMEK; JOE M ALDACO; WILLIAM E BAKER; T BARANKOWSKI; JERRY A BRISCOE; RONNIE P BROOKS; GREGORY P COUNTIE; J DEVEREUX; RUSSELL FEUSSEL; BARBARA GASTMYER; JAMES KLEIN; DONALD KLEPAC; STEVEN MCCREARY; DONNIE PARDUE; JAMES PRITCHARD; L N RACKLEY; J R ROBERTS; JACKIE SHALLINGTON; DENNIS SPRADLIN; STANLEY STEPHENS; B G WILLOUGHBY; THOMAS ZIELINSKI; JEFFREY E BICKEL; MONTY T BRADNEY; JEFFREY L

Appendix A

HATFIELD; SCOTT A MORROW; ROY P MOODY; ARTHUR OSBORNE; CHERI A PAGE; VINCENT C RUSSO; W J WISSEL, JR; HOUSTON POLICE OFFICERS' UNION,

Intervenors-Plaintiffs-Appellants

Appeals from the United States District Court
for the Southern District of Texas
(98-CV-1600 & 92-CV-2510)

Before JOLLY, DeMOSS, and PARKER, Circuit Judges

PER CURIAM:*

In 1975 and 1976, two groups of plaintiffs brought suit against the City of Houston, Texas, under the captions *Kelley v. Hofheinz* and *Comeaux v. City of Houston*. The suits alleged, *inter alia*, that the promotional examinations used by the Houston Police Department ("HPD") were racially discriminatory. Comeaux was consolidated into *Kelley* and settlement discussions continued, unsuccessfully, until 1983, when the suit became dormant for several years. In 1992, a group of African-American and Hispanic-American police officers moved to intervene in *Kelley*, alleging that they had been harmed by racially discriminatory promotional examinations for the ranks of Sergeant and Lieutenant in the HPD. Ultimately, the district court directed those officers to file a new lawsuit. They did so on August 19, 1992, under

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the caption *Edwards v. City of Houston.* The remainder of the original *Kelley* plaintiffs were then consolidated therein.

The *Edwards* action alleged that the examinations had the effect of disproportionately excluding African-Americans and Hispanic-Americans from promotion to Sergeant, and African-Americans from promotion to Lieutenant, from 1982 onward. The plaintiffs sued on their own behalf and on behalf of others similarly situated or who would be competing for promotions to each rank in the future. Settlement negotiations between the plaintiffs and the City of Houston began in the fall of 1992 and culminated in a proposed Consent Decree. Before a fairness hearing could be conducted by the district court, various other police officer groups sought to intervene, including the Houston Police Patrolmen's Union and others. The district court denied the motion to intervene but allowed the putative intervenors to cross-examine witnesses, present evidence, and raise objections to the proposed Consent Decree during a fairness hearing.

On March 25, 1993, the district court certified a class consistent with the plaintiffs' complaint and entered a final Consent Decree. The Consent Decree included, *inter alia*, the provisions that (1) African-Americans and Hispanic-Americans who took the Sergeant exam from January 1, 1982, to that date, and who passed at least one such exam, would receive a total of 96 remedial promotions; (2) African-Americans and Hispanic-Americans who took the Sergeant exam from January 1, 1982, to that date, and who were promoted after a discriminatorily long period delaying their ability to compete for Lieutenant promotions, would receive five remedial promotions to Lieutenant; and (3) African-

Americans who took the Lieutenant exam from January 1, 1982, to that date, and who passed at least one such exam, would receive a total of five remedial promotions.

Several of the putative intervenors appealed the Consent Decree and the denial of their motion to intervene. A panel of this court affirmed the district court. We then re-heard the case *en banc* and concluded that the intervention should have been allowed. *See Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (*en banc*). On remand, the district court converted the Consent Decree into an interim order which permitted, but did not require, the City of Houston to make remedial promotions in an "acting capacity," leading to full pay and recognition for the promotions, but not seniority or retirement benefits. On February 19, 1997, the City of Houston created, by ordinance, 18 Sergeant and two Lieutenant positions. In accordance with the Consent Decree, 16 of the Sergeant positions were reserved for and filled by African-American and Hispanic-American police officers.

In May 1998, non-promoted HPD members filed a new suit in *Countie v. City of Houston*, claiming reverse discrimination. The district court[1] granted summary judgment to the City of Houston concluding that the Countie plaintiffs could not prove their *prima facie* case of discrimination because they were not qualified for the positions and, alternatively, that their claims were barred by 42 U.S.C. §§ 2000e-2(n). *See Countie*, No. H-98-CV-1600 (S.D. Tex. Mar. 30, 2000) (Order on cross-motions for summary judgment).

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1. The *Countie* suit was also filed in the Southern District of Texas, Houston Division, but was presided over by a different district judge than in the *Edwards* proceedings.

Appendix A

The *Countie* plaintiffs appealed. Before we heard oral arguments, the district court in *Edwards* entered a final Consent Decree, which made permanent the City of Houston's 16 interim promotions. *See Edwards*, No. H-92-2510 (S.D. Tex. Apr. 2, 2001) (Final Consent Decree). The Houston Police Patrolmen's Union and other interested parties then appealed that ruling.

We consolidated the various actions and heard oral argument from each of the parties.

We review a district court's determination of a Title VII Consent Decree for abuse of discretion. *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984). This is particularly true where the district court has been involved in the negotiations arriving at the proposed Consent Decree, such as by conducting fairness hearings and hearing evidence presented by the parties and intervenors. *Id.* at 1558-59. Although voluntary settlement of Title VII employment discriminations suits is preferable, a district court cannot summarily approve such a settlement without making an independent decision concerning the fairness of every provision in the Decree. *Id.* at 1559. "This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of the record, whether established by evidence, affidavit or stipulation." *Id.* When third parties are involved, the effect of the Decree on those parties can be "neither unreasonable nor proscribed." *Id.* at 1560.

Based on our review of the opinion of the district court, the briefs, and the record, and having heard oral argument, we are of the opinion that the district court did not abuse its discretion. For the reasons stated by the district court, we AFFIRM the Consent Decree in *Edwards*. This affirmance renders MOOT any matter pending in *Countie*.

APPENDIX B — FINAL CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED MARCH 30, 2001 AND ENTERED APRIL 2, 2001

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-92-2510
Judge Lynn Hughes

DOROTHY A. EDWARDS, AFRO-AMERICAN POLICE OFFICERS LEAGUE, THE HOUSTON POLICE ORGANIZATION OF SPANISH SPEAKING OFFICERS, LIONEL AARON, BENNIE CONWAY, CLEMENT BOYD CROSBY, JR., JOSE GARCIA, JR., RICHARD C. GARCIA, MARIA L. GUILLORY, ANTHONY R. JAMMER, CHARLES A. MCCLELLAND, SILAS MONTGOMERY, JR., CLYDE PHILPOTT, CARL WAYNE REED, RICHARD M. SPENCER, and BRUCE D. WILLIAMS,

individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF HOUSTON,

Defendant.

and

HOUSTON POLICE PATROLMEN'S UNION *et al.*, and HOUSTON POLICE OFFICERS' UNION, *et al.*,

Third-Party Intervenors.

Appendix B

Final Consent Decree

A. Introduction and History of This Case

1. This is a class action employment discrimination suit brought by African-American and a. Hispanic-American police officers, the Afro-American Police Officers League, and the Houston Police Organization of Spanish Speaking Officers ["plaintiffs"] against the City of Houston ["the City"] pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the Civil Rights Act of 1991 and the Equal Employment Opportunity Act of 1972 ["Title VII"]. As used herein, the term "plaintiffs" does not include any of the third-party intervenors.

2. This lawsuit has been consolidated with two earlier lawsuits, *Comeaux v. City of Houston*, Civil Action No. 76-H-1754, and *Kelley v. Hofheinz*, Civil Action No. H-75-1536, filed in this Court in 1976 and 1975, respectively. These lawsuits challenged a variety of allegedly discriminatory practices, and the Comeaux action specifically challenged discrimination in promotional tests. By the Order entered on June 18, 1992 in *Comeaux* and *Kelley*, all claims of discrimination not involving promotional examinations have been dismissed, and the claims of discrimination involving promotional examinations have been limited to promotions for the ranks of Sergeant and of Lieutenant from January 1, 1982 on.

3. In this action, plaintiffs have challenged as discriminatory the promotional examinations for the rank of Lieutenant and for the rank of Sergeant in the Houston Police

Department ["HPD"] which were administered during the period from 1982 through 1991 and the system pursuant to which these examinations are prepared. Plaintiffs alleged in this lawsuit that the challenged examinations had the effect of disproportionately excluding African-Americans and Hispanic-Americans from promotion to Sergeant from 1982 to date, and of disproportionately excluding African-Americans from promotion to Lieutenant from 1982 to date, but were neither job-related nor consistent with business necessity.

4. The plaintiffs sued on their own behalf, on behalf of the African-American and Hispanic-American members of the Police Department who took a Sergeant examination from 1982 through 1991 or who will compete for promotions to Sergeant in the future, and on behalf of African-American members of the Police Department who took a Lieutenant examination from 1982 through 1991 or who will compete for promotions to Lieutenant in the future.

5. Plaintiffs' proposed class did not include Hispanic Americans who took Lieutenant examinations from 1982 through 1991, because the records of the City show that the Lieutenant examinations did not operate to exclude Hispanic-Americans from promotion to Lieutenant during this period of time. However, plaintiffs alleged that the Sergeant examination discriminatorily delayed the promotions of both African-Americans and Hispanic-Americans to the rank of Sergeant, and a delay in their promotion to the rank of Sergeant is necessarily a delay in their ability to compete for promotion to Lieutenant.

6. The plaintiffs and the City have consented to the settlement of this action and to the relief provided herein. The third-party intervenors have not consented to the provisions of this Consent Decree.

7. This updated Consent Decree reflects and describes the actions taken prior to October 16, 2000, including amendments to the version of the Consent Decree granted preliminary approval on Feb. 3, 1993, the actions taken pursuant to the Interim Order of Feb. 5, 1997, and the completion of all remedial promotions although some are still acting promotees.

B. Certification of the Plaintiff Class, and Finding of Jurisdiction

8. Based upon the stipulations of the plaintiffs and the defendant and the information of record, the Court certifies and defines the following class:

a. All African-Americans who are employed, or at any time since January 1, 1982 were employed, as Class A peace officers by HPD and who took a promotional examination for the rank of Lieutenant or for the rank of Sergeant which was administered at any time from January 1, 1982 to the present, and those who will compete for such promotions in the future; and

b. All Hispanic-Americans who are employed, or at any time since January 1, 1982 were employed, as Class A peace officers by HPD and who took a promotional examination for the rank of Sergeant which

was administered at any time from January 1, 1982 to the present, and those who will compete for such promotions in the future.

9. This Court has jurisdiction over the claims alleged herein by virtue of 28 U.S.C. §§ 1331 and 1343 and § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f). All of the administrative and procedural requirements to suit under Title VII have been satisfied.

C. Basis of the Consent Decree

10. Plaintiffs and the defendant agreed to enter the relief provided in the Consent Decree:

a. on evidence that the promotional examinations for Sergeant from 1982 through 1991 had a racially disparate impact on blacks;

b. on evidence that the promotional examinations for Sergeant from 1983 through 1991 had a racially disparate impact on Hispanics;

c. on evidence that the promotional examinations for Lieutenant from 1982 through 1991 had a racially disparate impact on blacks;

d. on evidence that there was a second type of racially disparate impact in the promotional examinations for Sergeant as to both blacks and Hispanics, in that the examinations substantially delayed the promotions of both blacks and Hispanics to Sergeant and thus substantially postponed their ability to compete for promotion to Lieutenant;

e. on ample evidence that the City's promotional examinations for the ranks of Sergeant and Lieutenant from 1982 through 1991 were not job-related, or that there was substantial doubt as to their job-relatedness; and

f. on the experience of the Houston Fire Department in having promotional examinations prepared in the same manner as the Police Department promotional examinations, with the same personnel in the Houston Civil Service Department working on both examinations, in having performed a criterion-related validation study on the promotional examinations to the first two promotional ranks in the Fire Department, Chauffeur and Junior Captain, on seeing plaintiffs' expert study, and in concluding that there was substantial risk of being found liable if the case were not settled.

11. The evidence received in the 1999 fairness hearing, which included evidence adduced during the 1993 fairness hearing, and the findings of this Court, show that the defendant City had, and continues to have, a strong basis in evidence as to each of the above factors.

D. Retrospective Injunctive Relief for the African-Americans and Hispanic-Americans Harmed by the City's Use of the Challenged Examinations

12. Members of the plaintiff class have received 96 remedial promotions to Sergeant, and 10 remedial promotions to Lieutenant, as set forth below.

13. The plaintiffs and class members [hereafter, collectively termed "class members"] receiving remedial

promotions shall also receive full back seniority in rank, for both competitive and entitlement or "benefits" purposes other than pension benefits, as if they had actually been promoted on the test in question. The back seniority in rank shall not apply to pension benefits. No plaintiff or class member shall receive back seniority back to the seniority date of a test he or she did not take. The seniority dates shall be the dates six calendar months after the establishment of the register pursuant to which they were promoted, as set forth in the following table:

Table 1. Seniority Dates for Class Members Receiving Remedial Promotions

Sergeant Register	Date of Seniority in Rank, for Remedial Promotions From this Register
9/23/82	3/23/83
11/17/83	5/17/84
1/31/85	7/31/85
7/17/86	1/17/87
10/29/87	4/29/88
4/27/89	10/27/89
10/31/91	4/31/92

Lieutenant Register	Date of Seniority in Rank, for Remedial Promotions From this Register
9/27/84	3/27/85
3/3/88	9/3/88
10/12/89	4/12/90
5/23/91	11/23/91

Appendix B

14. In order to minimize any effect of these remedial promotions on members of the Police Department (including plaintiffs or class members) competing for promotions in the usual course, these promotions were phased in over a five-year period as follows:

Table 2. Schedule of Making Remedial Promotions

Year of Promotion	Sergeant	Lieutenant
1993	22	3
1994	21	2
1995	19	2
1996	18	2
1997	16	1

The 1996 remedial promotions were stayed by order of the court of appeals. The 1996 remedial promotions, along with the 1997 remedial promotions, were ultimately made on an acting basis in 1997 under the Feb. 5, 1997, Interim Order.

15. A class member who received a remedial promotion, or who was bypassed for a remedial promotion during those years pursuant to the provisions of ¶ 18, was able to take a promotional examination for the next higher rank after having served in the lower rank for one year, without regard to his or her retroactive seniority in that rank. For example, a class member receiving a remedial promotion to Sergeant with ten years of retroactive seniority as a Sergeant was nonetheless required to work as a Sergeant for one year before being eligible to compete for promotion to Lieutenant.

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16. Although plaintiffs do not agree that the results of the challenged examinations have anything to do with qualifications, both plaintiffs and the defendant recognized that there was no presently available means of determining qualifications except for whatever information may be provided by the test scores. In order to ensure that each of the class members receiving remedial promotions was qualified (to the extent that the challenged test scores can so indicate), no class member received a remedial promotion for a particular rank unless he or she had passed at least one of the promotional examinations for that rank during the 1982-1992 period.

17. Subject to the provisions of ¶¶ 16 and 27, the remedial promotions for a particular rank were made from among those plaintiffs and class members who passed one or more of the promotional examinations for that rank from 1982 to date, and who had not yet been promoted to that rank.

18. A potential conflict arose when a class member who was otherwise eligible to receive a remedial promotion was also on an eligibility list for a regular promotion, and was reached or was reachable during the life of that eligibility list. In such a situation, the class member was required to take the regular promotion, and was not allowed to take a remedial promotion.

19. To ensure equity for class members subject to the provisions of ¶ 16 above, a class member who was bypassed for a remedial promotion pursuant to ¶ 16 received back seniority in rank at the time of his or her regular promotion, as if he or she had received a remedial promotion instead.

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The provisions of this paragraph were given priority over the provisions of other paragraphs of the Consent Decree on the allocation of remedial promotions.

20. The remedial promotions to Sergeant were allocated as follows, based on the shortfall figures on which the plaintiffs and the City had agreed:

Table 3. Allocation of the Remedial Promotions to Sergeant

	Number of Vacancies	
Sergeant Examination	Blacks	Hispanics
9/23/82	5	0
11/17/83	8	7
1/31/85	10	7
7/17/86	6	2
10/29/87	7	7
4/27/89	10	1
10/31/91	16	10
Total	62	34

21. African-Americans suffered 64.6% of the shortfall in Sergeant promotions, are receiving 64.6% of the remedial promotions to Sergeant, and received this proportion of the remedial promotions to Sergeant made in each of these years: 14 remedial promotions in 1993, 14 in 1994, 12 in 1995, 12 in 1996 that were stayed and were ultimately received in 1997, and 10 that were scheduled and received in 1997.

22. Hispanic-Americans suffered 35.4% of the shortfall in Sergeant promotions, are receiving 35.4% of the remedial promotions to Sergeant, and received this proportion of the remedial promotions to Sergeant made in each of these years:

8 in 1993, 7 in 1994, 7 in 1995, 6 in 1996 that were stayed and were ultimately received in 1997, and 6 that were scheduled and received in 1997.

23. Five of the ten remedial promotions to Lieutenant were allocated as follows:

Table 4. Allocation of Five Remedial Promotions to Lieutenant

	Number of Vacancies
Lieutenant Examination	Blacks
9/27/84	1
3/3/88	1
10/12/89	1
5/23/91	2

24. In addition to the five remedial promotions to Lieutenant described above, there were five other remedial promotions to Lieutenant as a form of remedy for the delay in promotion to Sergeant which occurred as a result of the Sergeant examinations, and which in turn delayed the ability of those class members promotees to compete for promotion to the rank of Lieutenant. African-Americans shall receive two of these promotions, and Hispanic-Americans shall receive three of these promotions. The class members to receive these promotions shall be those class members promoted to Sergeant who have waited the longest times between taking their first Sergeant examination after January 1, 1982 and their promotions, and who have taken and passed the examination for promotion to Lieutenant, but who have not yet been promoted. One such promotion was scheduled

to be made per year over the five-year phase-in period, with the first such promotion going to an Hispanic-American and the further promotions alternating between African-Americans and Hispanic-Americans. The promotion scheduled for 1996 was stayed, and occurred in 1997 instead. The Sergeants promoted pursuant to this paragraph received back seniority in the rank of Lieutenant to a date six months after the date of the next Lieutenant examination which was given at least two years after their promotion to Sergeant, subject to the conditions and limitations of ¶ 13 of this Consent Decree. The provisions of ¶¶ 18 and 19 above apply to these remedial promotions the same as to the others.

25. Counsel for plaintiffs developed the list of the class members to receive remedial promotions, and presented it to the City for approval. The Court would have been able to resolve any disagreements, but plaintiffs and the defendant are able to resolve all questions by themselves.

26. In compiling the list, the individual named plaintiffs had priority for receiving the remedial promotions if they otherwise qualified under the standards set forth herein. The next priority was to use rank order on the test in question.

27. If for any reason there were not enough still-employed-but-unpromoted class members of a particular racial or ethnic group who took and passed one of the challenged tests to make up the numbers of remedial promotions for that group from that test, but there are class members of that group who failed the test in question but passed another test for the same rank within the 1982-1992 time period, such class members were given remedial promotions for the test notwithstanding their failure of the test.

28. If for any reason these numbers still could not be made up for a particular test by the class members of the appropriate group in question who took the test, they were made up from among the unpromoted class members of that group passing another test, starting with the earliest test from 1982 to date with unpromoted but passing class members.

29. If any class member declined a remedial promotion for any reason, that promotion was given to the next-highest-ranking (or scoring) plaintiff or class member.

30. The order in which remedial promotions were phased in was as follows: (1) the individual named plaintiffs satisfying the conditions set forth herein were promoted first, subject to the allocation of promotions as between African-Americans and Hispanic-Americans; (2) remedial promotions were thereafter made in rank order from among test-passers and in order of test score (if known) or total score (where test score was not separately stated) among those class members who did not pass this test but passed another test for the same HPD rank; (3) and the tests within the 1982-1992 time period were reached in chronological order, with the earliest test first.

E. Limitations on Remedial Seniority in Rank

31. On. February 5, 1999, the Court directed the plaintiffs and the defendant to reduce the number of plaintiff class members with remedial seniority in rank to the number of remedial promotions. On July 12, 1999, plaintiffs' and the defendant City filed their Joint Motion for Approval of their Joint Report to the Court on the Restriction of the

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Number of Class Members with Remedial Seniority to 106 Persons. Their Report set forth two principles to govern the question of which plaintiff class members were to lose their remedial seniority in rank:

> a. The first principle proposed by the parties is that the class member originally scheduled to receive a remedial promotion, but who was reachable on a regular list and was therefore required to delay any promotion for up to two years until he or she was reached on the regular list, while another class member took the remedial promotion, should be the person to keep the constructive rank seniority for that promotion. Promotions result in pay increases of several thousands of dollars a year. The mandatory delay in promotion may therefore have cost the original class member several thousand dollars, and retention of the constructive rank seniority is the only countervailing benefit to that person. The "extra" remedial rank seniority should be taken from the class member who received an earlier promotion because of that provision of the Consent Decree.
>
> b. Second, where a class member who received constructive rank seniority has died or left the Police Department ending that grant of constructive rank seniority, that end should be taken into account as reducing the total number of grants of constructive rank seniority towards the goal of 106. Otherwise, the trimming of grants of remedial seniority in rank ordered by the Court will reduce the extant total to fewer than the 106 grants to which the plaintiffs and defendants were ordered to conform.

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32. The Motion is well taken, and it is granted. The Plaintiffs' and Defendant's Joint Motion for Approval of their Joint Report to the Court on the Restriction of the Number of Class Members with Remedial Seniority to 106 Persons is approved. The defendant shall remove the remedial seniority in rank of the following persons, and shall correct its records to show seniority in rank only from the date of their promotion to that rank:

Name	**Employee and Required Adjustment**
Auzenne, Adam	87559 (must lose remedial rank seniority as Sergeant)
Sanchez, Richard	61115 (must lose remedial rank seniority as Sergeant)
Rodriguez, Ralph	81759 (must lose remedial rank seniority as Sergeant)
Carradero, Julio	79433 (must lose remedial rank seniority as Sergeant)
Rios, William	82381 (must lose remedial rank seniority as Sergeant)
Munoz, Roberto	59098 (must lose remedial rank seniority as Sergeant)
Salazar, James	77805 (must lose remedial rank seniority as Sergeant)

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Calix, Elvin	82345 (must lose remedial rank seniority as Sergeant)
Castaneda, Rodolfo	57866 (must lose remedial rank seniority as Sergeant)
Picazo, William	88981 (must lose remedial rank seniority as Sergeant)
Ong, Cynthia	80764 (must lose remedial rank seniority as Sergeant)
Conway, Bennie	57680 (remedial rank seniority as Lieutenant must be changed from March 27, 1985, to April 12, 1990)
Freddy Guidry	31177 (must lose remedial rank seniority as Lieutenant)
Trevino, John P.	58748 (must lose remedial rank seniority as Lieutenant)
Trevino, Elma A.	81000 (would have lost remedial rank seniority as Lieutenant, but resigned)

These Sergeants and Lieutenants shall have seniority in rank based on the dates of their acting or permanent promotions. They shall lose any take-home cars they now possess solely as a result of constructive seniority in rank, but shall not be removed from their present assignments and shifts for the purpose of allowing re-bidding for those positions.

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F. Waiver of Back Pay

33. Plaintiffs and their class waive all claims for back pay and interest under all Federal and State anti-discrimination laws arising from the City's use of the challenged examinations.

34. Plaintiffs and their class do not waive any right they may have to seek appropriate relief against any person who, or organization which, takes any action which has the effect of unreasonably delaying any remedial promotions under this Consent Decree. This paragraph is not intended, and shall not be construed, to apply to any person or organization, whether or not a member of the plaintiff class, for making an adequately founded objection to this settlement under the procedures set forth below for determining whether this Consent Decree should be given final approval, or for pursuing that objection on appeal.

G. Prospective Relief

35. To the extent that the City develops new promotional examinations for Sergeant and Lieutenant through its Civil Service Department and does not use alternative examining procedures pursuant to Meet and Confer agreements, the City defendants shall continue the procedures for the development and use of promotional examinations for Sergeant and Lieutenant which were used for the development of the promotional examinations for Sergeant and Lieutenant from 1982 to date, except as follows:

a. A firm date for the administration of the selection procedure and the final list of books (or parts thereof) or

other texts shall be announced to members of the HPD at least ninety days in advance of the administration of the selection procedure.

b. The City may continue to use its present system allowing protests of particular test items, the multiple-keying of some items where appropriate, and the discarding of other test items where appropriate.

c. The remaining items on the test shall be scored. Test-takers must achieve a score of 70% of the remaining items correct in order to pass the test and to be eligible for promotion.

d. Seniority points shall be added to the score on the written test, as is done at present, in order to obtain a rank-ordered list. The City shall post an eligibility list as soon as possible. The City shall continue its present procedures for making promotions on a rank ordered basis. The City shall consult with the plaintiffs herein before making any change in these procedures in the future.

e. Promotional registers of test-passers resulting from use of the new selection procedures shall remain in effect for a period of two and one-half years unless earlier exhausted.

f. The September 30, 1992 Lieutenant promotional register was extended for one year, so that it expired on September 30, 1994. The extension of this list benefitted all of the persons who passed this test, regardless of race or national origin.

g. To the extent reasonably necessary to comply with the former provisions of paragraph with respect to log-linear analysis, the City may sometimes have taken a longer period of time to make promotions than the time allowed under State law, without incurring any liability for back pay for such additional period of time.

h. The provisions of this paragraph supersede any provisions of The Fire and Police Civil Service Act, Texas Local Government Code chapter 143, as amended, to the contrary.

36. Nothing in this Consent Decree shall be construed to prevent any amendment of The Fire and Police Civil Service Act, Texas Local Government Code chapter 143, to create a statutory two-year life, or longer life, for promotional registers for any position in the HPD.

37. Nothing in this Consent Decree shall be construed to prevent the defendant from adopting an alternative selection procedure for promotion to the ranks of Sergeant or Lieutenant, if (1) the promotions from such procedure have no adverse impact against African-Americans or Hispanic-Americans or (2), if the use of the procedure in question results in adverse impact against either African-Americans or Hispanics, if the procedure in question meets the requirements of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (2000), is job-related and consistent with business necessity, and if all reasonable steps consistent with job-relatedness and business necessity have been taken to eliminate such adverse impact or reduce it to the greatest extent practicable.

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a. Subject to the other provisions of this paragraph, the Court notes that the plaintiffs have expressly approved the concept of the current Meet and Confer Agreement between the City and the Houston Police Officers' Union as the bargaining representative for officers of the Police Department on this subject, which was approved by an overwhelming vote of officers, combining a written test of some type and a properly conducted assessment center of some type, and using the test to determine which promotional candidates will be processed in the assessment center. While counsel for plaintiffs and the plaintiffs' expert may make suggestions as to the development and use of such procedures, they are not required to attend any of the negotiations between the City and bargaining agent over a new Meet and Confer agreement.

b. The defendant shall keep counsel for plaintiffs, as well as other affected employee groups or their counsel, informed of the details of its progress in considering, evaluating, and adopting such procedures, and before any such procedure is put into effect the defendant shall so report to the Court and shall obtain and make available to counsel for plaintiffs all information regarding the likelihood that making promotions under the new procedure will result in adverse impact against African-Americans or Hispanic-Americans, and all information regarding the job-relatedness of the procedure and its consistency with business necessity.

38. Plaintiffs may make comments and suggestions to the defendant regarding such an alternative selection procedure, through their counsel or by themselves, but shall not be bound

by any such comment or suggestion, and shall remain free to challenge the new procedure herein in the event that it has adverse impact against African-Americans or Hispanic-Americans in practice, unless plaintiffs and the defendant enter into a formal agreement and stipulation to that effect, which is submitted to the Court for approval and which is approved by the Court. Other affected employee groups may also make comments and suggestions.

H. Attorneys' Fees and Costs

39. (a) The City shall pay the reasonable attorneys' fees, costs and expenses, in an amount to be negotiated by the parties or determined by the Court, for all services performed by the Lawyers' Committee for Civil Rights Under Law, by co-counsel, and by all attorneys and paralegals employed by them, in this case and in connection with plaintiffs' effort to intervene in the *Comeaux* and *Kelley* litigation, and for all other reasonable services performed and expenses incurred through the conclusion of all judicial proceedings on the grant of final approval to the Consent Decree and/or the propriety of the relief provided, including the defense of such relief against collateral attack. The parties shall attempt to negotiate in good faith over the amount of such recovery.

(b) The procedure for resolving fee claims as between the plaintiffs and the City is that counsel for plaintiffs shall informally submit to the defendant their claim for attorneys' fees and expenses, with supporting breakdowns. Within thirty days after the receipt of this submission, or within such further time as the plaintiffs and the defendant may informally agree, the defendant shall

provide its response, which shall include (1) an itemized list of each of its objections to the submission, if any, indicating the particular items to which it objects and the reasons for the objection; (2) its proposed resolution of each objection; and (3) the amount which it does not contest, and contends would be a reasonable amount for the award of attorneys' fees and expenses herein. The defendant shall forthwith pay the uncontested amount. In the event that the amount of fees and expenses is litigated and plaintiffs recover an amount additional to the uncontested amount, plaintiffs shall also recover prejudgment interest on the amount of their recovery, at the rate of 10% per annum, from the thirtieth day after the receipt of plaintiffs' submission until the date of payment of the amount recovered.

40. (a) The City shall pay the reasonable attorneys' fees up to a maximum of $ 20,000 annually, plus costs and expenses (including reasonable expert fees in the amounts actually charged to counsel for plaintiffs), of plaintiffs for future services in monitoring the defendants' compliance with this Consent Decree. Plaintiffs shall have the right to seek relief from this limit in the discretion of the Court, in the event of a substantial failure by the City to comply with the provisions of this Consent Decree or a substantial effort required in connection with a proposed alternative selection procedure.

(b) The procedure and mechanism described in ¶ 39(b) shall be applied to awards of attorneys' fees under ¶ 40(a) for monitoring compliance with the Consent Decree. Plaintiffs shall decide when to submit their statements.

Appendix B

I. Reporting and Record-Keeping

41. At quarterly intervals after the effective date of this Consent Decree, the City shall report to plaintiffs on the steps it has taken to fulfill the provisions of this Consent Decree, including the name of each promotee and the date of each promotion to the ranks of Sergeant and Lieutenant.

42. With respect to each examination for Sergeant and Lieutenant within the ten-year period after the grant of final approval of this Consent Decree, promptly after the completion of any proceeding on the protest of the scoring of any item under the City's normal civil service procedures or any alternative procedures, the City shall provide counsel for plaintiffs with the following information:

a. a computer-readable data file containing the name, race, seniority points, score on each part of the promotional procedure, and scored answers to each examination item (correct or incorrect);

b. the final rank-ordered register of persons passing the test, showing the final written score, any assessment center score, seniority points, total score, rank (if any), and race of each test-taker. Persons failing the test shall be listed alphabetically.

c. Plaintiffs may make reasonable requests of the City for further information which would be helpful in determining any question of compliance with the Consent Decree, or which would assist in achieving its goals.

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J. Retention of Jurisdiction, and Duration of the Consent Decree

43. This case shall be dismissed as settled, subject to the parties' rights of appeal and to any remand proceedings required by a superior court. In the event of any subsequent dispute among the parties as to any of the matters resolved by this Consent Decree, this case shall upon motion be automatically reinstated on the docket of this Court as an active case, until such matter shall have been resolved.

44. The provisions of the Consent Decree shall be in force for ten years after the conclusion of all judicial proceedings on the grant of final approval to the Consent Decree and/or the propriety of the relief provided. Those portions of the Consent Decree that allow a deviation from the requirements of The Fire and Police Civil Service Act, Texas Local Government Code chapter 143, as amended, may continue to be utilized for a maximum period of ten years unless extended on motion of any party for good cause shown, provided that the expiration of the ten-year period shall not limit the life of a promotional register under ¶ 35(a) above if the examination leading to that register was administered during the ten-year period. The period for retention of jurisdiction and/or continuation of these Consent Decree provisions may in the discretion of the Court be extended on motion by any party for good cause shown.

K. The Former Log-Linear Analysis

45. The form of proposed Consent Decree originally presented to the Court and given preliminary approval

contained provisions for a log-linear analysis of test results, to identify biased test questions. All parties agreed to end the use of log-linear analysis and to substitute for that form of relief an additional six months' life, to a total of thirty months, for promotional registers for the ranks of Sergeant and Lieutenant. The Court approved a Consent Order to that effect on November 24, 1997.

46. Only three tests were subject to log-linear analysis: the 1993 Sergeant examination, the 1994 Lieutenant examination, and the 1995 Sergeant examination.

a. The 1993 Sergeant examination resulted in 94 promotions, and all of the promotees passed the original version of the test prior to log-linear analysis.

b. The 1994 Lieutenant examination resulted in 12 promotions, and all of the promotees passed the original version of the test prior to log-linear analysis.

c. The 1995 Sergeant examination resulted in 57 promotions, and all of the promotees passed the original version of the test without log-linear analysis.

47. There shall be no changes in past promotions or rank seniority as a result of the previous use of log-linear analysis.

L. Interim Promotions

48. Pursuant to the Interim Order of February 5, 1997, the parties estimate that approximately 120 acting promotions have been made from promotional registers, and another 37

acting remedial promotions have been made. These promotions shall be made permanent, and the promotees shall be considered in all respects as if they had received permanent regular promotions, or permanent remedial promotions, except for purposes of retrospective pension contributions. The City shall not be responsible for any additional payments to fund the promotees' pension benefits for this period, if any.

49. In the event that the grant of final approval to the Consent Decree is reversed on appeal, all promotions based on promotional registers that complied with the provisions of the Consent Decree, but did not comply with the provisions of State law, and all remedial promotions under this Consent Decree, shall be undone, and all such promotees shall be demoted to their prior ranks, regardless of whether the promotions were permanent or acting, unless all parties present an agreed proposal for a different course of action.

N. Pending motions

50. All outstanding motions are denied as moot.

M. Final Grant of Approval

51. The Court grants final approval to this modified form of the Consent Decree.

Signed at Houston, Texas, March 30, 2001.

s/ Lynn Hughes
LYNN HUGHES
United States District Judge

Appendix B

WE SO STIPULATE, AND WE ASK FOR THIS:

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APPENDIX C — FINDINGS OF FACT ON APPROVAL OF CONSENT DECREE FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED SEPTEMBER 12, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION H-92-2510

DOROTHY A. EDWARDS, *et al.*

Plaintiffs,

versus

CITY OF HOUSTON,

Defendant.

FINDINGS OF FACT ON APPROVAL OF CONSENT DECREE

1. African-American and Hispanic-American police officers sued the City of Houston because the City's promotional examinations for Sergeant and Lieutenant discriminated against them. The dispute between the plaintiffs and defendants was genuine and vigorously contested.

2. The plaintiffs and defendants settled their dispute. In January 1993, the parties submitted a proposed consent decree. The court gave notice of the proposed settlement to all interested persons and entities and scheduled a fairness hearing on March 24, 1993.

3. After the fairness hearing was scheduled, various police unions sought to intervene in the case to object to the proposed consent decree. The court denied the unions' request to intervene but permitted them to participate in the fairness hearing by (a) cross-examining witnesses; (b) proffering evidence, and (c) raising objections to the consent decree.

4. The unions were permitted to intervene after their appeal to the United States Court of Appeals for the Fifth Circuit. The case was remanded to permit the unions "to intervene in this suit, to allow them appropriate discovery, and to conduct a new fairness hearing." *Edwards v. City of Houston*, 78 F.3d 983, 1006 (5th Cir. 1996) (*en banc*). The unions were permitted to intervene to conduct discovery and to object to the settlement, not to assert new claims for affirmative relief or to assert veto power over the settlement.

5. The court scheduled a second fairness hearing, which the unions expanded into a three-day trial. The unions presented evidence in support of their objection to the consent decree. The plaintiffs and defendants presented evidence in support of the settlement.

6. *Pro se* plaintiffs Willie Fields and Bennie Green did not appear at the fairness hearing and their claims are dismissed.

7. The unions's experts were completely unpersuasive. Dr. Antel's report did not meet even minimum standards required for expert testimony. Dr. Landy's written report and expanded testimony at trial assumed that Dr. Rathjen

accurately described her work to develop the challenged tests, an assumption shown to be wrong. Dr. Landy persisted in mischaracterizing Dr. Lundquist's analysis to the point of losing any appearance of objectivity.

8. The experts testifying in support of the settlement were well-qualified and credible. Dr. Mann conducted a thorough review of the City's documentation and determined that the examinations adversely impacted the plaintiffs under the 80% rule or statistical significance, or both. His "odds ratio" test was appropriate for the aggregate pools. Dr. Friedland testified credibly that the police department tests were structured like the fire department tests. Both tests were developed by Dr. Rathjen. The fire department tests were previously determined in other litigation not to be job related. Dr. Lundquist and Dr. Friedland are highly qualified and presented credible testimony about the flaws in Dr. Rathjen's development of the police department tests.

9. The promotional examinations for Sergeant and Lieutenant had a discriminatory impact on African-Americans and Hispanic-Americans. The promotional examinations were not job-related.

10. The City created 96 new Sergeant positions and 10 new Lieutenant positions for remedial promotions under the consent decree. The remedial promotions are precisely tailored to the injury caused to Plaintiffs by the promotional examinations. The remedial promotees were correctly chosen as the individuals most likely to have been specific victims.

Appendix C

11. No remedial promotion delayed the promotion of any other police officer. The only delays were caused by the unions. All police officers will benefit from the future opportunity to compete for these promotional positions as they become vacant.

12. The use of log-linear analysis was a proper incremental remedy. The promotions have been made and the program has been successfully completed. Although the plaintiffs and defendants agree to replace the log-linear analysis with an extension of the life of promotional registers from 24 to 30 months, there is no basis to alter the promotions made from the three test registers compiled under the log-linear analysis: the 1993 and 1995 Sergeant examinations and the 1994 Lieutenant examination. Any police officer who was denied a promotion under the consent decree was denied only the opportunity to compete for a position *created by* the consent decree.

13. The relief in the amended consent decree is necessary to remedy the harm shown.

14. The settlement is fair and appropriate. The court approves the consent decree as previously modified in the final judgment entered March 25, 1993, and in the consent order entered November 25, 1997.

15. The Court adopts its earlier findings of fact and conclusions of law, entered March 25, 1993.

Appendix C

Signed September 12, 2000, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Court

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, DATED MARCH 25, 1993

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-92-2510

Judge Lynn Hughes

DOROTHY A. EDWARDS, *et al.*,
individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF HOUSTON,

Defendant.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

I. *Findings of Fact*

A. *The Proceedings in This Case*

1. The original Complaint in this action was filed on August 19, 1992, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended by the Civil

Rights Act of 1991 and the Equal Employment Opportunity Act of 1972 ["Title VII"].[1] The plaintiffs in this action had filed timely charges of racial discrimination with the U.S. Equal Employment Opportunity Commission, alleging that the City's promotional examinations for the ranks of Sergeant and Lieutenant in the Houston Police Department discriminated against African-Americans and Hispanic-Americans, on the following dates:[2]

Name of Plaintiff	Date Charge Filed with EEOC
Sergeant Dorothy A. Edwards	August 29, 1991
African-American Police Officers' League	August 29, 1991
Houston Police Organization of Spanish Speaking Officers	March 26, 1992
Officer Lionel Aaron	March 26, 1992
Detective Bennie Conway	August 29, 1991
Officer Clement Boyd Crosby	March 26, 1992
Officer Jose A. Garcia	March 26, 1992
Officer Richard C. Garcia	March 26, 1992
Officer Maria L. Guillory	March 26, 1992
Sergeant Anthony R. Jammer	August 29, 1991
Sergeant Charles A. McClelland	August 29, 1991
Officer Silas Montgomery, Jr.	March 26, 1992
Officer Clyde Philpott	March 26, 1992
Officer Carl Wayne Reed	March 26, 1992
Sergeant Richard M. Spencer	August 29, 1991
Sergeant Bruce D. Williams	March 26, 1992

1. Docket entries.

2. Copies of the charges and the Notices of Right to Sue are attached to the Complaint in this action as Exhibits B and C.

2. On November 11, 1991, Richard T. Seymour, attorney-in-charge for plaintiffs, wrote to the City to notify the City directly that he and Ms. Acosta represented the charging parties, requested information on the questions of the adverse impact of the challenged tests and their job-relatedness, and suggested that the charging parties and the respondent City use the time while the matter was before the EEOC to gather the necessary information and to see if they could settle the matter. The City provided some of the requested information, but was not interested at that time in pursuing settlement.[3]

3. Efforts to obtain redress for the Police Department's allegedly discriminatory tests began in 1975 and 1976, when *Kelley v. Hofheinz*, Civil Action No. H-75-1536, and *Comeaux v. Cite of Houston*, Civil Action No. 76-H-1754, were filed. Among other claims, these cases raised the claim that the promotional examinations of the Houston Police Department discriminated against African-American police officers because of their race, in violation of Title VII of the Civil Rights Act of 1964, as amended. These cases' challenges to the promotional tests were based upon 1975 and 1976 EEOC charges of racial discrimination in the promotional tests. The *Comeaux* action was consolidated into *Kelley*. The consolidated cases are hereinafter referred to collectively as *Kelley*.

4. Ten years ago, in 1983, there were unsuccessful settlement discussions between the Kelley plaintiffs and the City.[4]

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3. Plaintiffs' exhibit 17, Affidavit of Mr. Seymour, ¶ 2.

4. Defendant City of Houston's Motion to Dismiss for Want of Prosecution, filed April 17, 1992 in *Comeaux*, at 2.

5. On April 16, 1992, the City refused to consent to the intervention in *Kelley* of the Afro-American Police Officers League, the Houston Police Organization of Spanish Speaking Officers, and a group of African-American and Hispanic-American police officers.[5]

6. On April 17, 1992, the Afro-American Police Officers League, the Houston Police Organization of Spanish Speaking Officers, and a group of African-American and Hispanic-American police officers moved for leave to intervene in *Kelley*, alleging that they had been harmed by racially discriminatory promotional examinations for the ranks of Sergeant and Lieutenant in the Houston Police Department, that the disposition of *Kelley* could impair their interests, and that in light of the passage of time their interests were not being represented effectively in *Kelley*.[6]

7. On the same day, the defendant City moved to dismiss *Kelley* for want of prosecution.[7] Its Motion recited at p. 3 that counsel for the city had on April 16, 1992 "conferred by telephone with Richard Seymour of the Lawyers' Committee for Civil Rights Under Law, who had previously indicated he represented several individuals who intended to intervene in this litigation", and that the motion was opposed.

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5. Certificate of Conference to Motion of Applicants for Intervention for Leave to Intervene as Plaintiffs-Intervenors, filed herein on April 17, 1992, at 6.

6. Complaint and docket entries.

7. Docket entries.

8. Prior to a hearing on the motions, counsel for the applicants for intervention unsuccessfully tried to interest the City in settlement discussions. The applicants suggested that, if meaningful settlement discussions could begin, the Court could be notified of that fact and asked to defer ruling on applicants' motion for leave to intervene and the City's motion to dismiss for a reasonable time, to allow settlement discussions to proceed. The City was not interested.[8]

9. A hearing was held on June 15, 1992, on the City's Motion to Dismiss *Kelley*, and on the motion for leave to intervene. At the hearing, the City argued that *Kelley* should be dismissed, that the intervention should be denied, that if the applicants for intervention wanted to challenge promotional tests they should do so in a new case, that any such challenge should be limited to the 1991 tests as to which the applicants for intervention had filed their EEOC charges, and that in any event if the applicants were allowed to challenge any earlier tests Hispanic-Americans should not be included in any such challenge. In sum, the City did everything possible to bar or limit the relief sought by plaintiffs. After the Court expressed reluctance to allow the continued maintenance of testing claims going back to 1975, the applicants for intervention proposed a compromise under which they would only assert testing claims as to tests given after January 1, 1982. The City refused to enter into such a compromise.

10. The Court accepted the City's arguments in part, and rejected them in part. The Order of June 17, 1992 in *Kelley* dismissed all claims in *Kelley* for want of prosecution

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8. Plaintiffs' exhibit 17, Affidavit of Mr. Seymour, ¶ 3.

except for test-promotion related claims after January 1, 1982, denied the application for leave to intervene, ordered the applicants for intervention to file a new lawsuit to be transferred to the same Court, directed that the remainder of *Kelley* be consolidated into the new lawsuit, and ordered that the new class consist of blacks and Hispanics. This case was timely filed on August 19, 1992, after the receipt of Notices of Right to Sue issued by the Attorney General of the United States, and the remnant of *Kelley* has been consolidated into this action.

11. In this action, plaintiffs have challenged as discriminatory the promotional examinations for the rank of Lieutenant and for the rank of Sergeant in the Houston Police Department ["HPD"] which were administered during the period from 1982 to date and the system pursuant to which these examinations are prepared. Plaintiffs alleged in this lawsuit that the challenged examinations had the effect of disproportionately excluding African-Americans and Hispanic-Americans from promotion to Sergeant from 1982 to date, and of disproportionately excluding African-Americans from promotion to Lieutenant from 1982 to date, but were not job-related or consistent with business necessity.

12. The plaintiffs sued on their own behalf, on behalf of the African-American and Hispanic-American members of the Police Department who took a Sergeant examination from 1982 to date or who will compete for promotions to Sergeant in the future, and on behalf of African-American members of the Police Department who took a Lieutenant examination from 1982 to date or who will compete for promotions to Sergeant in the future.

13. Plaintiffs' proposed class did not include Hispanic Americans who took Lieutenant examinations from 1982 to date, because the records of the City show that the Lieutenant examinations did not operate to exclude Hispanic-Americans from promotion to Lieutenant during this period of time. However, plaintiffs alleged that the Sergeant examination discriminatorily delayed the promotions of both African-Americans and Hispanic-Americans to the rank of Sergeant, and a delay in their promotion to the rank of Sergeant is necessarily a delay in their ability to compete for promotion to Lieutenant.

14. Plaintiffs have obtained substantial discovery from the City, pursuant to both formal and informal requests. The discovery included Registers of Eligibles for the period from January 1, 1982 through 1992 on which the City provided racial identifications for the promotional candidates for whom it could identify race, vacancy announcements, and other materials. Settlement discussions began in earnest in the Fall of 1992, after several boxes of materials had been provided to counsel for plaintiffs. Further responses to discovery were suspended pending the outcome of the negotiations.

B. *Certification of the Class, and Finding of Jurisdiction*

15. Based upon the stipulations of the parties and the information of record, the Court certifies and defines the following class:

a. All African-Americans who are employed, or at any time since January 1, 1982 were employed, as Class

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A peace officers by HPD and who took a promotional examination for the rank of Lieutenant or for the rank of Sergeant which was administered at any time from January 1, 1982 to the present, and those who will compete for such promotions in the future; and

b. All Hispanic-Americans' who are employed, or at any time since January 1, 1982 were employed, as Class A peace officers by HPD and who took a promotional examination for the rank of Sergeant which was administered at any time from January 1, 1982 to the present, and those who will compete for such promotions in the future.

16. This Court has jurisdiction over the claims alleged herein by virtue of 28 U.S.C. §§ 1331 and 1343 and § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f). All of the administrative and procedural requirements to suit under Title VII have been satisfied.

C. *The Rank Structure Within the Police Department*

17. The entry-level uniformed position within the Houston Police Department is Police Officer. The first-level promotional position is currently the rank of Sergeant. Police Officers with two years' service as Police Officers are allowed to compete for the rank of Sergeant.

18. At the time *Kelley* was filed, there were two promotional positions for which entry-level Police Officers could compete: Detective and Sergeant. The Detective rank has since been merged with the Sergeant rank. No separate examination for Detective has been given for several years.

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19. The second-level promotional position within the Houston Police Department is the rank of Lieutenant. Sergeants with two years' service as Sergeants are allowed to compete for the rank of Lieutenant.

20. There are higher ranks within the Houston Police Department, but this case does not present any independent claim of discrimination in promotion to such ranks because of the selection procedures used for such ranks.

D. *The Disparate Impact of the Challenged Examinations*

1. *Racial Disparities in Selection Rates*

21. Sec. 4(D) of the *Uniform Guidelines on Employee Selection Procedures*, 43 Fed.Reg. 38297 (1978), 29 C.F.R. § 1607.4(D), defines "adverse impact" as either a selection rate for the racial or ethnic group in question which is less than four-fifths (4/5) of the selection rate for the best-performing group, or a difference in selection rates which is both statistically and practically significant. The tables below use the term "standard deviation". The number of standard deviations is a measure of how unusual it would be for a difference of at least this magnitude to occur by chance. Social scientists commonly use a .05 significance level (probability) — or, equivalently, one time in twenty — as sufficient to rule out chance. This corresponds to 1.96 standard deviations. The larger the number of standard deviations, the less likely it would be to get the observed result by chance.[9] It is difficult

9. For example, a .01 level of probability — one time in a hundred — corresponds to approximately 2.54 standard deviations. Three standard deviations corresponds to a .0027 level of probability, or 27 times in ten thousand. Four standard deviations corresponds to a .000063 level of probability, or sixty-three times in a million.

for a test of statistical significance to detect that a modest difference is not due to chance when the size of the sample is small. For this reason, it is useful to aggregate statistical information over a period of years.

22. Paragraphs 23-42 below were stipulated as correct by the parties in the proposed Consent Decree. Various objectors have challenged the relevancy of these calculations, but no objector has presented evidence drawing these stipulations into question. The Court therefore accepts the stipulations as correct. The objections as to relevancy are discussed below.

23. The challenged examinations for Sergeant have had adverse impact against both African-Americans and Hispanic-Americans. Moreover, African-American and Hispanic-American officers who have been promoted to Sergeant have because of these examinations had to wait for promotion substantially longer than non-Hispanic whites have had to wait. The tables in the following paragraphs show the detailed information. The term "shortfall" used in the tables is the difference between the number of promotions actually received by persons of a particular racial or ethnic group and the number they would have received if they had been promoted at the same rate at which whites were promoted.

24. In the September 23, 1982 Sergeant Examination, the rate of promotion for African-Americans was only 42.9% of the rate of promotion for whites, resulting in a shortfall of 5 African-American promotions. There was no adverse impact against Hispanic-American officers on this test.

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Table 1: September 23, 1982 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	0	85	33	14
Promoted:	0	30	5	5
% Promoted:	N.A.	35.3%	15.2%	35.7%
Promotion Rate as % of White Rate:			42.9%	N.A.
Availability of Blacks, Hispanics:			25.0%	10.6%
Total Promotions Among All Groups:			40	40
Actual Promotions of Blacks and Hispanics			5	5
Expected Promotions of Blacks and Hispanics			10.0	4.2
—Difference Between Actual and Expected Promotions ("Shortfall"):			-5.0	0.8

25. In the November 17, 1983 Sergeant Examination, the rate of promotion for African-Americans was only 34.2% of the rate of promotion for whites, resulting in a shortfall of 8 African-American promotions. The rate of promotion for Hispanic-Americans was only 28.5% of the rate of promotion for whites, resulting in a shortfall of 7 Hispanic-American promotions. These differences were also statistically significant at the .05 level, meaning that there is less than one chance in twenty that such a difference, or a larger difference, could have occurred by chance.

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Table 2: November 17, 1983 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	2	295	75	60
Promoted:	1	69	6	4
% Promoted:	50.0%	23.4%	8.0%	6.7%
Promotion Rate as % of White Rate:			34.2%	28.5%
Availability of Blacks, Hispanics:			17.4%	13.9%
Total Promotions Among All Groups:			80	80
Actual Promotions of Blacks and Hispanics			6	4
Expected Promotions of Blacks and Hispanics			13.9	11.1
—Difference Between Actual and Expected Promotions ("Shortfall"):			-7.9	-7.1
Standard Deviation:			3.4	3.1
Number of Standard Deviations Between Expected and Actual Promotions			-2.329	-2.299

26. In the January 31, 1985 Sergeant Examination, the rate of promotion for African-Americans was only 38% of the rate of promotion for whites, resulting in a shortfall of 11 African-American promotions. The rate of promotion for Hispanic-Americans was only 42.2% of the rate of promotion for whites, resulting in a shortfall of 7 Hispanic-American promotions. The difference between white and African-

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American promotion rates was statistically significant for African-Americans at the .01 level, meaning that there is less than one chance in a hundred that such a difference, or a larger difference, could have occurred by chance. The difference between white and Hispanic-American promotion rates was statistically significant for Hispanic-Americans at the .05 level, meaning that there is less than one chance in twenty that such a difference, or a larger difference, could have occurred by chance.

Table 3: January 31, 1985 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	5	408	87	61
Promoted:	1	111	9	7
% Promoted:	20.0%	27.2%	10.3%	11.5%
Promotion Rate as % of White Rate:			38.0%	42.2%
Availability of Blacks, Hispanics:			15.5%	10.9%
Total Promotions Among All Groups:			128	128
Actual Promotions of Blacks and Hispanics			9	7
Expected Promotions of Blacks and Hispanics			19.9	13.9
—Difference Between Actual and Expected Promotions ("Shortfall"):			-10.9	-6.9
Standard Deviation:			4.1	3.5
Number of Standard Deviations Between Expected and Actual Promotions			-2.649	-1.964

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27. In the July 17, 1986 Sergeant Examination, none of the 79 African-American test-takers was promoted, so the rate of promotion for African-Americans was 0% of the rate of promotion for whites, resulting in a shortfall of 6 African-American promotions. The rate of promotion for Hispanic-Americans was only 36.7% of the rate of promotion for whites, resulting in a shortfall of 2 Hispanic-American promotions. The difference between white and African-American promotion rates was statistically significant for African-Americans at the .01 level, meaning that there is less than one chance in a hundred that such a difference, or a larger difference, could have occurred by chance.

Table 4: July 17, 1986 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	1	352	79	58
Promoted:	0	33	0	2
% Promoted:	0.0%	9.4%	0.0%	3.4%
Promotion Rate as % of White Rate:			0.0%	36.7%
Availability of Blacks, Hispanics:			16.1%	11.8%
Total Promotions Among All Groups:			35	35
Actual Promotions of Blacks and Hispanics			0	2
Expected Promotions of Blacks and Hispanics			5.6	4.1
—Difference Between Actual and Expected Promotions ("Shortfall"):			-5.6	-2.1

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Standard Deviation:	2.2	1.9
Number of Standard Deviations Between Expected and Actual Promotions	-2.594	-1.121

28. In the October 29, 1987 Sergeant Examination, the rate of promotion for African-Americans was only 41.2% of the rate of promotion for whites, resulting in a shortfall of 7 African-American promotions. The rate of promotion for Hispanic-Americans was only 31.3% of the rate of promotion for whites, resulting in a shortfall of more than 6 Hispanic-American promotions. These differences were also statistically significant at the .05 level, meaning that there is less than one chance in twenty that such a difference, or a larger difference, could have occurred by chance.

Table 5: October 29, 1987 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	3	362	97	73
Promoted:	1	63	7	4
% Promoted:	33.3%	17.4%	7.2%	5.5%
Promotion Rate as % of White Rate:			41.5%	31.5%
Availability of Blacks, Hispanics:			18.1%	13.6%
Total Promotions Among All Groups:			75	75
Actual Promotions of Blacks and Hispanics			7	4
Expected Promotions of Blacks and Hispanics			13.6	10.2

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—Difference Between Actual and Expected Promotions ("Shortfall"):	-6.6	-6.2
Standard Deviation:	3.3	3.0
Number of Standard Deviations Between Expected and Actual Promotions	-1.978	-2.097

29. In the April 27, 1989 Sergeant Examination, the rate of promotion for African-Americans was only 20.8% of the rate of promotion for whites, resulting in a shortfall of 11 African-American promotions. The rate of promotion for Hispanic-Americans was only 74% of the rate of promotion for whites, resulting in a shortfall of 1 Hispanic-American promotion. The difference between white and African-American promotion rates was statistically significant for African-Americans at the .01 level, meaning that there is less than one chance in a hundred that such a difference, or a larger difference, could have occurred by chance.

Table 6: April 27, 1989 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	7	410	129	109
Promoted:	1	61	4	12
% Promoted:	14.3%	14.9%	3.1%	11.0%
Promotion Rate as % of White Rate:			20.8%	74.0%
Availability of Blacks, Hispanics:			19.7%	16.6%
Total Promotions Among All Groups:			78	78

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Actual Promotions of Blacks and Hispanics	4	12
Expected Promotions of Blacks and Hispanics	15.4	13.0
—Difference Between Actual and Expected Promotions ("Shortfall"):	-11.4	-1.0
Standard Deviation:	3.5	3.3
Number of Standard Deviations Between Expected and Actual Promotions	-3.235	-0.298

30. In the October 31, 1991 Sergeant Examination, the rate of promotion for African-Americans was only 27.8% of the rate of promotion for whites, resulting in a shortfall of 17 African-American promotions. The rate of promotion for Hispanic-Americans was only 31.8% of the rate of promotion for whites, resulting in a shortfall of 10 Hispanic-American promotions. Each of these differences was also statistically significant at the .01 level, meaning that there is less than one chance in a hundred that such a difference, or a larger difference, could have occurred by chance.

Table 7: October 31, 1991 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	7	415	175	111
Promoted:	0	94	11	8
% Promoted:	0.0%	22.7%	6.3%	7.2%
Promotion Rate as % of White Rate:			27.8%	31.8%

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Availability of Blacks, Hispanics:	24.7%	15.7%
Total Promotions Among All Groups:	113	113
Actual Promotions of Blacks and Hispanics	11	8
Expected Promotions of Blacks and Hispanics	27.9	17.7
—Difference Between Actual and Expected Promotions ("Shortfall"):	-16.9	-9.7
Standard Deviation:	4.6	3.9
Number of Standard Deviations Between Expected and Actual Promotions	-3.692	-2.514

31. In the aggregate, the rate of promotion for African-Americans in the Sergeant Examinations from 1982 through 1992 was only 31.4% of the rate of promotion for whites, resulting in a shortfall of 64 African-American promotions. The rate of promotion for Hispanic-Americans was only 34% of the rate of promotion for whites, resulting in a shortfall of 34 Hispanic-American promotions.

Table 8. 1982-1991 Aggregate Sergeant Examinations

	Other	Whites	Blacks	Hispanics
Test-Takers:	25	2,326	675	486
Promoted:	4	461	42	42
% Promoted:	16.0%	19.8%	6.2%	8.6%
Promotion Rate as % of White Rate:			31.4%	43.6%

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Availability of Blacks, Hispanics:	19.2%	13.8%
Total Promotions Among All Groups:	549	549
Actual Promotions of Blacks and Hispanics	42	42
Expected Promotions of Blacks and Hispanics	105.5	76.0
—Difference Between Actual and Expected Promotions ("Shortfall"):	-63.5	-34.0
Standard Deviation:	9.2	8.1
Number of Standard Deviations Between Expected and Actual Promotions	-6.880	-4.199

However, when adding the shortfall figures from the individual examinations, the shortfall in African-American promotions to Sergeant from 1982 through 1992 was 62 promotions, rather than 64, and the shortfall in Hispanic-American promotions to Sergeant from 1982 through 1992 remained 34 promotions. For the purposes of settlement, the lower figure of 62 African-American promotions, based on the individual examinations, shall be used. The promotion rate for Asian-Americans, Philippine Americans and Others was 80.8% of the promotion rate for whites, a figure falling just short of the cutoff for determining adverse impact under the "4/5" rule. One additional promotion would have brought their promotion rate to 20%, which is higher than the white rate of promotions.

32. The challenged examinations for the rank of Lieutenant have had adverse impact against African-Americans.

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33. Many fewer persons took the individual examinations for promotion to Lieutenant than did so for promotion to Sergeant. Rather than set forth the test-by-test results for each test, the following paragraphs show information for only those tests with adverse impact against African-Americans under the "4/5 rule" and a shortfall of at least one black.

34. In the September 27, 1984 Lieutenant Examination, the rate of promotion for African-Americans was only 36.6% of the rate of promotion for whites, resulting in a shortfall of 1.4 African-American promotions.

Table 9. September 27, 1984 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	1	123	13	13
Promoted:	0	28	2	1
% Promoted:	0.0%	22.8%	15.4%	7.7%
Promotion Rate as % of White Rate:			67.6%	
Availability of Blacks:			8.7%	
Total Promotions:			31	
Observed Promotions of Blacks:			2	
Expected Promotions of Blacks:			2.7	
—Difference Between Observed and Expected Promotions ("Shortfall"):			-0.7	

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35. In the March 3, 1988 Lieutenant Examination, the rate of promotion for African-Americans was 0% of the rate of promotion for whites, resulting in a shortfall of 1 African-American promotion.

Table 10. March 3, 1988 Lieutenant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	0	98	11	7
Promoted:	0	10	0	1
% Promoted:	N.A.	10.2%	0.0%	14.3%
Promotion Rate as % of White Rate:			0.0%	
Availability of Blacks:			9.5%	
Total Promotions:			11	
Observed Promotions of Blacks:			0	
Expected Promotions of Blacks:			1.0	
—Difference Between Observed and Expected Promotions ("Shortfall"):			-1.0	

36. In the October 12, 1989 Lieutenant Examination, the rate of promotion for African-Americans was only 67.6% of the rate of promotion for whites, resulting in a shortfall of 1 African-American promotion.

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Table 11. October 12, 1989 Lieutenant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	0	76	15	9
Promoted:	0	15	2	2
% Promoted:	N.A.	19.7%	13.3%	22.2%

Promotion Rate as % of White Rate:	67.6%
Availability of Blacks:	15.0%
Total Promotions:	19
Observed Promotions of Blacks:	2
Expected Promotions of Blacks:	2.9
—Difference Between Observed and Expected Promotions ("Shortfall"):	-0.9

37. In the May 23, 1991 Lieutenant Examination, the rate of promotion for African-Americans was only 54.8% of the rate of promotion for whites, resulting in a shortfall of 2.5 African-American promotions.

Table 12. May 23, 1991 Sergeant Examination

	Other	Whites	Blacks	Hispanics
Test-Takers:	1	111	19	15
Promoted:	1	32	3	6
% Promoted:	100.0%	28.8%	15.8%	40.0%

Promotion Rate as % of White Rate:	54.8%

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Availability of Blacks:	13.0%
Total Promotions:	42
Observed Promotions of Blacks:	3
Expected Promotions of Blacks:	5.5
—Difference Between Observed and Expected Promotions ("Shortfall"):	-2.5

38. Table 13 shows aggregate information for all of the Lieutenant examinations from 1982 through 1991, including the 1992 promotions from the 1991 Lieutenant register of eligibles. The recent 1992 Lieutenant examination is excluded from this table because only two persons from the register compiled from that examination have been promoted.

39. In the aggregate, the rate of promotion for African-Americans in the Lieutenant Examinations from 1982 through 1992 (excluding the late 1992 test) was only 60.3% of the rate of promotion for whites, resulting in a shortfall of 5 African-American promotions. There was no adverse impact against Hispanics in rates of promotion to Lieutenant, and no adverse impact against Asian-Americans, Philippine Americans, and Others.

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Table 13. 1982-1991 Lieutenant Examinations in the Aggregate

	Other	Whites	Blacks	Hispanics
Test-Takers:	5	681	90	71
Promoted:	1	113	9	12
% Promoted:	20.0%	16.6%	10.0%	16.9%
Promotion Rate as % of White Rate:			60.3%	101.9%
Availability of Blacks:			10.6%	
Total Promotions:			135	
Observed Promotions of Blacks:			9	
Expected Promotions of Blacks:			14.3	
—Difference Between Observed and Expected Values ("Shortfall"):			-5.3	

2. *Racial Disparities in Waiting Time Before Promotion*

40. The Sergeant examinations from 1982 through 1992 caused additional adverse effects on members of the class who were promoted, as well as their adverse impact on class members who were not promoted. African-Americans and Hispanic-Americans have tended to be clustered towards the bottoms of the lists of eligibles, and as a result have had to wait longer than whites to be promoted from a register. Table 14 shows the average number of days' wait from the establishment of a register of eligibles for Sergeant until promotion, for the period of time from 1982 through 1992, for those members of each racial and ethnic group who were promoted:

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Table 14. Number of Days' Wait from the Establishment of a Register to Promotion for the Average Officer of Each Group Who Was Promoted to Sergeant from 1982 through 1992

	Whites	Blacks	Hispanics
Average Days' Wait from Establishment of Register Until Promotion:	171.7	212.0	222.4

41. These racial differences resulting from the Sergeant promotional examinations are even more pronounced when examining the delay until promotion across tests. Table 15 shows the average number of days' wait to promotion for the persons in each racial or ethnic group, starting with their first competition for Sergeant in 1982 or later, until the date of promotion:

Table 14. Number of Days' Wait from First Competition for Sergeant (1982 and later) Until Promotion to Sergeant, for the Averacte Officer Promoted to Sergeant from 1982 through 1992

	Whites	Blacks	Hispanics
Average Days' Wait from First Effort to Be Promoted (in 1982 or later), until Promotion:	530.7	810.1	780.9

Thus, both African-Americans and Hispanic-Americans on average had to wait six months longer than whites to be promoted.

42. The Lieutenant examinations from 1982 through 1991 caused additional adverse effects on members of the class who were promoted, as well as their adverse impact on class members who were not promoted. African-Americans have tended to be clustered towards the bottoms of the lists of eligibles, and as a result have had to wait longer than whites to be promoted from a register. The average successful African-American candidate for promotion to Lieutenant had to wait 336.4 days to be promoted from that register, compared to 226 days for whites. The average number of days' wait to promotion for the persons, starting with their first competition for Lieutenant in 1982 or later, until the date of promotion, was 783.7 days for African-Americans, compared to 615.6 days for whites.

3. *Racial Disparities in Mean and Median Written Scores*

43. The City calculated mean test scores by race and gender for the 1982 Sergeant examination, and calculated both mean and median written test scores by race and gender for the 1982, 1983, 1986, and 1987 Sergeant examinations, and for the 1982 and 1986 Lieutenant examinations. This information was provided to plaintiffs in response to discovery.[10] It shows a generally consistent sizable racial disparity in test scores between whites and African-Americans

10. Plaintiffs' exhibits 11-16.

of the same gender, and between whites and Hispanic-Americans of the same gender:

Table 16. The City's Calculation of Racial Disparities in Mean and Median Written Test Scores

A. **September 23, 1982 Sergeant Examination**

Race and Gender	No.	Mean Score
White Males	87	67.41
Black Males	28	61.32
Hispanic Males	11	62.73
Phil. Males	0	N.A.
Asian Males	0	N.A.
White Females	3	68.33
Black Females	3	47.67
Hispanic Females	0	N.A.
Phil. Females	0	N.A.
Asian Females	0	N.A.

B. **November 17, 1983 Sergeant Examination**

Race and Gender	No.	Mean Score	Median Score
White Males	301	58.46	60.66
Black Males	58	52.09	50.00
Hispanic Males	46	54.16	54.00
Phil. Males	0	N.A.	N.A.
Asian Males	0	N.A.	N.A.

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White Females	14	59.14	60 33
Black Females	10	49.53	52.00
Hispanic Females	1	67.33	67.33
Phil. Females	1	72.00	72.00
Asian Females	1	44.66	44.66

C. **July 17, 1986 Sergeant Examination**

Race and Gender	No.	Mean Score	Median Score
White Males	327	62.31	61.00
Black Males	64	56.64	55.00
Hispanic Males	52	59.04	70.50
Phil. Males	1	55.00	55.00
Asian Males	0	N.A.	N.A.
White Females	24	61.75	57.00
Black Females	17	49.34	46.00
Hispanic Females	6	52.67	44.00
Phil. Females	0	N.A.	N.A.
Asian Females	0	N.A.	N.A.

D. **October 29, 1987 Sergeant Examination**

Race and Gender	No.	Mean Score	Median Score
White Males	341	75.47	76.00
Black Males	80	69.27	71.00
Hispanic Males	65	66.09	65.00
Phil. Males	3	84.66	87.00
Asian Males	0	N.A.	N.A.

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White Females	21	73.00	73.00
Black Females	17	67.64	68.00
Hispanic Females	8	73.62	75.00
Phil. Females	0	N.A.	N.A.
Asian Females	0	N.A.	N.A.

E. **June 24, 1982 Lieutenant Examination**

Race and Gender	No.	Mean Score
White Males	493	76.00
Black Males	15	60.00
Hispanic Males	27	71.00
Phil. Males	1	N.A.
Asian Males	0	N.A.
White Females	18	61.50
Black Females	0	N.A.
Hispanic Females	0	N.A.
Phil. Females	0	N.A.
Asian Females	0	N.A.

F. **December 11, 1986 Lieutenant Examination**

Race and Gender	No.	Mean Score	Median Score
White Males	68	75.13	75.50
Black Males	12	70.58	69.00
Hispanic Males	6	68.00	66.00
Phil. Males	0	N.A.	N.A.
Asian Males	1	70.00	70.00

White Females	1	86.00	86.00
Black Females	2	82.50	82.50
Hispanic Females	0	N.A.	N.A.
Phil. Females	0	N.A.	N.A.
Asian Females	0	N.A.	N.A.

44. The information in Table 16 is consistent with the information in Tables 1-15 showing substantial racial disparities in promotion rates.

45. Plaintiffs have.also performed calculations of the mean differences in test scores. Where information on the written test score was available, this was used. Where only information on total score was available from the test-registers, this was used. Information was calculated for whites, African-Americans, Hispanic-Americans, and others, a category which includes Asian-Americans and Philippine Americans. The following table shows the results:[11]

Table 17. Plaintiffs' Calculation of Racial Disparities in Mean Test Scores

A. **September 23, 1982 Sergeant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	85	73.36	
Others, Asians, Phil.	0	N.A.	N.A.
African-Americans	33	64.82	-8.54
Hispanic-Americans	14	69.50	-3.86

11. Affidavit of Barbara Diggs, plaintiffs' exhibit 4.

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B. **November 17, 1983 Sergeant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	295	64.93	
Others, Asians, Phil.	1	78.00	13.07
African-Americans	75	58.13	-6.80
Hispanic-Americans	60	58.85	-6.08

C. **January 31, 1985 Sergeant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	408	75.36	
Others, Asians, Phil.	1	59.00	-16.36
African-Americans	87	67.31	-8.05
Hispanic-Americans	61	70.38	-4.98

D. **July 17, 1986 Sergeant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	352	62.12	
Others, Asians, Phil.	1	55.00	-7.12
African-Americans	79	55.32	-6.80
Hispanic-Americans	58	59.09	-3.03

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E. **October 29, 1987 Sergeant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	362	75.33	
Others, Asians, Phil.	3	84.67	9.34
African-Americans	97	68.99	-6.34
Hispanic-Americans	73	66.92	-8.41

F. **April 27, 1989 Sergeant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	410	66.66	
Others, Asians, Phil.	6	63.67	-2.99
African-Americans	129	60.04	-6.62
Hispanic-Americans	109	60.16	-6.50

G. **October 31, 1991 Sergeant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	415	74.61	
Others, Asians, Phil.	6	57.50	-17.11
African-Americans	175	66.85	-7.76
Hispanic-Americans	111	67.21	-7.40

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H. **June 24, 1982 Lieutenant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	54	83.87	
Others, Asians, Phil.	1	91.00	7.13
African-Americans	3	69.67	-14.20
Hispanic-Americans	4	79.50	-4.37

I. **August 11, 1983 Lieutenant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	63	77.37	
Others, Asians, Phil.	1	68.00	-9.37
African-Americans	3	58.00	-19.37
Hispanic-Americans	9	69.22	-8.15

J. **September 27, 1984 Lieutenant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	123	83.85	
Others, Asians, Phil.	1	76.00	-7.85
African-Americans	13	77.08	-6.77
Hispanic-Americans	13	80.85	-3.00

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K. **November 7, 1985 Lieutenant Examination**

Race	No.	Mean Total Score	Difference From Mean White Score
Whites	88	80.19	
Others, Asians, Phil.	1	70.00	-10.19
African-Americans	12	75.25	-4.94
Hispanic-Americans	8	72.25	-7.94

L. **December 11, 1986 Lieutenant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	68	75.66	
Others, Asians, Phil.	0	N.A.	N.A.
African-Americans	14	72.29	-3.37
Hispanic-Americans	6	68.00	-7.66

M. **March 3, 1988 Lieutenant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	98	68.98	
Others, Asians, Phil.	0	N.A.	N.A.
African-Americans	11	65.36	-3.62
Hispanic-Americans	7	70.71	1.73

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N. **October 12, 1989 Lieutenant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	76	81.73	
Others, Asians, Phil.	0	N.A.	N.A.
African-Americans	15	77.75	-3.98
Hispanic-Americans	9	76.67	-5.06

O. **May 23, 1991 Lieutenant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	111	73.11	
Others, Asians, Phil.	1	84.00	10.89
African-Americans	19	73.21	0.10
Hispanic-Americans	15	73.73	0.62

P. **September 30, 1992 Lieutenant Examination**

Race	No.	Mean Written Score	Difference From Mean White Score
Whites	85	69.82	
Others, Asians, Phil.	2	65.50	-4.32
African-Americans	20	66.00	-3.82
Hispanic-Americans	15	65.80	-4.02

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46. This table shows a generally consistent pattern in which test scores obtained by African-Americans and by Hispanic-Americans are generally lower than test scores obtained by whites. This is consistent with the above findings on adverse impact in promotion rates.

47. The information in this table as to Asian-Americans, Philippine Americans and others contains averages for very few test-takers, and the information is correspondingly less meaningful. There is much less consistency of results. The overall picture is consistent with the lack of adverse impact against Asian-Americans, Philippine Americans and Others shown in findings 31 and 39 above.

4. *The Question of Adverse Impact Against Women*

48. Female and Asian-American Police Officers have also objected to the settlement on the ground that it does not contain information on the question of adverse impact against women and, in the event that there is such adverse impact, does not provide relief for such adverse impact.

49. The parties are not aware of any EEOC charge having been filed which raises the question of gender discrimination against women in the Police Department's promotional examinations. There is no evidence that such a charge was filed, and no claim of gender discrimination has ever been made in this lawsuit.

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50. The City has not provided gender-identified Registers of Eligibles to plaintiffs for all registers, and no information on gender was entered onto the database until the objections of women were filed. Plaintiffs' paralegal, Barbara Diggs, examined the first names of test-takers in an effort to assign gender to them, so that an approximate analysis could be performed for the 1989 and 1991 Sergeant examinations. She was not able to determine gender for 26 test-takers in 1989 or for 27 test-takers in 1991. Because it was likelier that more women would be taking the Sergeant examinations than the Lieutenant examinations, the analysis was done only for Sergeants. The results are as follows:[12]

Table 18. Approximate Adverse Impact Calculation for the 1989 and 1991 Sergeant Examinations, by Gender

A. **April 27, 1989 Sergeant Examination**

	Unknown	Males	Females
Test-Takers:	26	562	67
Promoted:	0	69	7
% Promoted:	0%	12.3%	10.4%
Promotion Rate as % of White Rate:			85.1%
Availability of Women Among Gender-Identified Test-takers			10.7%
Total Promotions:			76

12. Affidavit of Ms. Diggs, plaintiffs', exhibit 4.

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Observed Promotions of Women:	7
Expected Promotions of Women:	8.1
—Difference Between Observed and Expected Promotions ("Shortfall"):	-1.1
Standard Deviation:	2.7
Number of Standard Deviations Between Expected and Observed Promotions	-0.407

B. **October 31, 1991 Sergeant Examination**

	Unknown	Males	Females
Test-Takers:	27	600	81
Promoted:	0	101	10
% Promoted:	0%	16.8%	12.3%

Promotion Rate as % of White Rate:	73.3%
Availability of Women Among Gender-Identified Test-takers	11.9%
Total Promotions:	111
Observed Promotions of Women:	10
Expected Promotions of Women:	13.2
—Difference Between Observed and Expected Promotions ("Shortfall"):	-3.2

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Standard Deviation:	3.4
Number of Standard Deviations Between Expected and Observed Promotions	-0.939

The results for the 1991 examination show a low degree of adverse impact under the "4/5" rule, although the results are not statistically significant. With the aggregation of enough tests, it may be possible to show statistically significant disparities by gender.

51. Some of these women are class members, however (41 of the 81 women taking the 1991 test), and there is a risk of double-counting adverse impact under both race and gender.

52. It is not clear that there has been substantial adverse impact against women because of their gender, distinct from adverse impact against African-American women or Hispanic-American women because of their race.

53. The resolution of this lawsuit will not impair women in any effort they may make to prove any disparate impact against them as women, distinct from any adverse impact some women share with other class members because of their race, arising from the promotional examinations in the Police Department. It will not prevent any woman aggrieved by any gender discrimination in these promotional examinations from filing an EEOC charge of discrimination, and will not limit them in seeking remedial promotions or in obtaining an analysis of possible gender bias in test items comparable to the log-linear analysis to eliminate racially biased test items.

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5. *Objections to the Showing of Disparate Impact*

(a) *The Contention that Plaintiffs Must Prove Disparate Impact on a Ouestion-by-Ouestion Basis*

54. The Houston Police Patrolmen's Union ["HPPU"] contends that a showing of disparate impact cannot be made based on racial disparities in promotion rates, but can only be made on a question-by-question basis, or can only be made as to those questions which are contended not to be job-related.[13]

55. HPPU's proposal is not an efficient or workablemeans of showing disparate impact. *First*, showings of the disparate impact of each particular question on an examination would require keypunching the answers of each test-taker to each item on the examination. A total of 708 candidates took the October 31, 1991 Sergeant Examination, and keypunching 100 items for each candidate would require keypunching 70,800 items of information in addition to name and race for just one examination. This would be enormously expensive. *Second*, the adverse impact of a particular test item is not meaningful without reference to the whole test:

a. The City does not make promotions based on responses to specific test items, but in response to the total scores on all test items.

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13. HPPU Objections, ¶ 9 at 8-9 and ¶ 16 at 12-13, Objections to Proposed Consent Decree, Vol. II, Tab 59.

b. While a great deal of adverse impact may occur as to a particular test question, it may be offset by other test questions, with the result that the test as a whole does not have enough adverse impact to be legally significant.

c. The adverse impact of a selection procedure may have little to do with particular items having an extraordinary degree of adverse impact, but may simply be the cumulation of small amounts of adverse impact on each item.

As a practical matter, it is the overall test score, plus seniority points, which determines the candidates who will be promoted, and it is the overall test score which is the appropriate unit for purposes of determining adverse impact. *Third*, the HPPU misconceives the function of identifying numerous test items which cannot readily be defended as job-related; this is not part of a showing of adverse impact, but is part of a showing of substantial doubt that the tests are job-related. The fact that numerous items are clearly not job-related suggests the presence of yet others which full litigation could identify as not job-related, and demonstrates that the overall test scores determining promotions are so substantially influenced by non-job-related components that the overall test scores cannot be said to be job-related.

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(b) *The Contention that the Parties Must Prove Adverse Impact Based on the Numbers of Persons Eligible to Take the Examination, Not on the Numbers of Test-Takers*

56. Doug Elder and Mark Clark, on behalf of members of the Houston Police Officers Association,[14] complain that showings of adverse impact should not be based on the proportions of test-takers of each race who were promoted, but on the proportions of persons eligible to take the test who were promoted.[15] Thus, if 2,000 whites were eligible to take the test, 1,000 took the test, and 500 were promoted, 25% of the eligible whites would have been promoted. If 500 African-Americans were eligible to take the test and every last one took it and only 125 were promoted, Elder and Clark would then say that there was no adverse impact because 25% of the eligible African-Americans had been promoted.

57. Even if following the approach suggested by Elder and Clark would make a difference in the determination of adverse impact — and they have offered no supporting evidence — it would make no sense. A person who chooses not to compete for promotion to Sergeant is not "eligible" for promotion: one of the conditions of eligibility is that one take the test. Indeed, Elder and Clark admit in their objection 2 that the analysis offered by the parties is the type "generally used" when dealing with objective tests.

14. Objections to Proposed Consent Decree, Vol. II, Tab 70.

15. *Id.*, Objection 1 at 5-6.

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(c) *The Contention That There Must be an Outside Audit*

58. Elder and Clark complain in their objection 2 that there must be an "independent or third party analysis or validation of the numbers or data". This is incorrect. The raw numbers of test-takers and promotions of members of each race have been set forth in the tables, and the HPPU can check both the arithmetic accuracy of the stated promotion rates for each race and any standard-deviation analysis from the raw numbers stated. The City's registers of eligibles are neither secret nor confidential, and a union with all of its resources ought to be able to confirm the accuracy of the raw numbers.

59. Contrary to the Elder and Clark statement,[16] the Court has never entered any Order blocking access to any statistical information. Moreover, Chief of Police Nuchia has sworn that no request for such information was ever made out, if these objectors had requested the information, it would have been given to them. Elder and Clark cannot be heard to complain of not having been given information which was freely available to them if they had simply bothered to request it.

(d) *The Contention That Entry-Level Officers Should Be Compared with Managers*

60. Plaintiffs and the City have not contended that adverse impact can be shown by comparing the racial

16. HPPU makes a similar misstatement in ¶¶ 16-17 of its proposed Complaint in Intervention.

composition of entry-level police officers with the racial composition of managers. This suggestion is only made by Elder and Clark at 9-10.

(e) *The Contention That Adverse Impact Should Be Determined Without Regard to Candidates Who Failed the Tests*

61. The objections of Herman Mar et al. state in ¶ 16 at 10-11 that the proper statistical comparison is the number of promotions in each racial group divided not by the number of test-takers in each group, but by the number of test-passers in that group. They assert without support that passing the test is necessary to show that one is "qualified". This assumes the very question at issue in a testing case: is the test valid?

62. A showing of disparate impact simply means that the challenged practice has done sufficient harm to the interests of a protected group to warrant an inquiry into its justification. The persons who fail a test are just as much harmed as those who pass but have scores too low to be reached for promotion. The objection is not valid.

(f) *The Contention That Passing Rates Are More Probative Than Promotion Rates*

63. Inconsistently, the Mar objectors also complain that adverse impact should be based on passing rates rather than promotion rates. Objections, ¶ 15 at 9-10. Here, they focus exclusively on persons who fail the test, and ignore persons who pass the test but obtain scores too low to be

reachable for promotion. This is a mirror image of their other objection, and is just as wrong.

64. In the ordinary course, there are many more test-takers who pass a promotional test for Sergeant or Lieutenant than the Police Department can promote. The City ranks them in order of their total scores, based on their written scores and up to ten seniority points, and promotes candidates based on their relative rank. It is not unusual for hundreds of test-passers to remain unpromoted on the expiration of the list.

65. The persons who pass a test but have scores too low to be reached for promotion are just as much harmed as those who fail the test. The objection is not valid.

(h) *Conclusion as to the Objections to the Determination of Adverse Impact*

66. None of the objections to the showing of adverse impact are substantial. The parties have adequately demonstrated the existence of adverse impact against both African-Americans and Hispanic-Americans on written portions of the Sergeant examinations from 1982 through 1992, and against African-Americans on the written portions of the Lieutenant examinations during this period.

67. The ninety-six remedial promotions for African-Americans and for Hispanics for the Sergeant examinations do not exceed the promotions actually lost because of the adverse impact caused by the written examinations themselves.

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68. The five remedial promotions for African-Americans for the Sergeant examinations do not exceed the promotions actually lost because of the adverse impact caused by the written examinations themselves.

69. The five remedial promotions to Lieutenant are an appropriate remedy for the delay in ability to compete for Lieutenant positions caused by the written portions of the Sergeant examinations.

70. No objector has presented any credible evidence that any factor other than the challenged tests accounts for any meaningful part of the racial disparities in promotion rates between whites and African-Americans, or between whites and Hispanics:

E. *The Job-Relatedness of the Challenged Examinations*

1. *Problems with the Job-Relatedness of Numerous Questions*

71. Plaintiffs have identified numerous questions on the examinations which they contended are on their face extremely difficult to defend as job-related and consistent with business necessity, while cautioning that a more detailed inquiry could reveal many others. Plaintiffs' counsel provided some of this information to the City in a meeting with the City Attorney held on December 1, 1992, prior to the City's decision to settle the case. On the City's request, counsel for plaintiffs provided the City on December 21, 1992 with a written list of such illustrative "problem questions" for several challenged promotional examinations,

and offered to prepare such a list for others of the challenged examinations if the City so desired.[17] Mr. Seymour's letter to counsel for the City stated:

> I have also gone through a number of the examinations in question, to add to the list of problems I went over with you and with Mr. Hall at our December 1 meeting, in connection with the illustrative May 1991 Lieutenant test. Naturally, I cannot identify problems which can only be discerned by examining the study materials and comparing them with the test items, and we have not gotten far enough to compare the assumptions of particular questions with the assigned duties of Sergeants and Lieutenants in the HPD. The following are the facially detectible problems:
>
> 1. September 23, 1982 Sergeant Examination: For several questions, it is hard to tell which are problem questions without looking at the text of the study materials. The following questions, however, appear on their face to be problematic: questions 36 (question requires ability to distinguish views of sociological theorists by name, where such ability has no relationship to the job), 44 (tendentious), and 88 (concerns unspecified person's theory, not job-related knowledge). In addition, knowledge of precise standards for charging particular offenses is not

17. Plaintiffs' exhibit 8.

relevant when the charging Officer and reviewing Sergeant actually make use of written standards instead of memory.

2. November 17, 1983 Sergeant Examination: For several questions, it is hard to tell which are problem questions without looking at the text of the study materials. The following questions, however, appear on their face to be problematic: questions 50 (familiarity with term "gestalt"); 52 (nothing to do with Sergeants); and 57, 59, 61, 65, 67, 68, 69, 72, 76, 77, 80, 82, 83, 86, 87, 88, 89, 95, 97, 99, 104, and 105 (questions require ability to distinguish among sociological theories by name, and to distinguish views of one author from those of another, where such ability has no relationship to the job). In addition, knowledge of precise standards for charging particular offenses is not relevant when the charging Officer and reviewing Sergeant actually make use of written standards instead of memory.

3. January 31, 1985 Sergeant Examination (same general points): The first page of the examination booklet indicates that the Civil Service Department saw a problem with question 19, but it is hard to read the notation. There are problems with questions 40 (on hypercube queuing model computer program, not used by HPD), 53 and 65 (tendentious), and 60 and 62 (no answer is accurate on its face, although the text should be checked to see if it is also inaccurate).

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4. July 17, 1986 Sergeant Examination. The first page of the examination booklet indicates that the Civil Service Department saw problems with questions 2, 9, 11, 14, 16, 20, 24, 25, 28, 29, 31 (the correct answer assumes that Sergeants are responsible for staffing, but this is not true in the HPD),[18] 34, 36, 49, 50 (two problems), 51, 53, 56, 60, 76, and 85, and that typographical errors affected three questions (numbers not fully legible, but could be 10, 48, and 87). In light of the City's own admission of these problems, no purpose would be served by our doing an independent check.

5. October 29, 1987 Sergeant Examination. The first page of the examination booklet indicates that the Civil Service Department saw problems with several questions (up to ten), but the markings are very faint on our copy and we cannot tell which items or their number. The body of the test indicates that there may have been a problem with question 14, but the remarks are illegible. There are also facially detectible problems with questions 6 (contradicts other tests covering the same subject), 12 (has to do with National Labor Relations Act definitions of unfair labor practices, which is inapplicable to the HPD), 16 (has to do with job evaluation, a matter of concern to industrial

18. This is an example of a problem which is found only by sitting down with members of the HPD, and which we would not have found simply by doing a desk review of the items. Other tests may contain similar problems without our being able to detect them.

psychologists and economists, not to Sergeants), 17, 22 (questions require ability to distinguish views of one author from those of another, where such ability has no relationship to the job), 29 (has to do with manufacturing, not with police work), and 30 (has to do with white-collar work, not police work).

6. April 27, 1989 Sergeant Examination. We only have question 1 through 92 on this test, and could not review the remainder. The Civil Service Department deleted questions 29 and 98 from the test after it was given. The largely illegible markings on the front sheet of the test indicate that the civil Service Department also had questions about items 9, 20, and 86, but these were retained. The body of the test indicates that there may have been a problem with question 19 (remarks not completely legible), contains largely illegible notes about question 86, and contains notes about question 89 ("claims it only applies to a misdemeanor"). There are also facially detectible problems with questions 9 (incomprehensible), 18 (question does not deal with what is correct and what is incorrect, but with what is not listed in text: the item rewards photographic memory and penalizes understanding of the point by officers who may recall it from another source), 71 (no answer is correct; without seeing the study text it is not possible to say whether the text itself is correct), and 72 (same; the item writer — or possibly the text author — has confused liberty with due process).

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> If it would be helpful to the City for me to identify such questions from other examinations, I will be happy to do so. It seems to me that these, in combination with the problems pointed out for the 1991 Lieutenant examination, should suffice.

72. This information was provided to the City before the City decided to settle this lawsuit. The City examined the information, and concluded that it would in fact be difficult to defend the job-relatedness of these, and perhaps other, questions. Indeed, the City Attorney read some of the non-job-related test questions to the City Council as part of his explanation of why the city feared it might not be able to defend this lawsuit successfully if it were litigated. The Council accepted the explanation.

73. The parties have provided the Court with copies of the challenged tests for *in camera* inspection. Based upon its inspection, the Court is satisfied that the City made a reasonable and arm's-length judgment that it would be difficult to defend the job-relatedness of many of the questions on these tests.

74. By Order of March 22, 1993, the Houston Police Patrol Union was allowed to designate two persons of its choosing to examine the questions for itself, subject to the requirement that the items not be disclosed.

75. The City also faced the risk that, if the litigation continued, closer inspection of the study materials and comparisons with actual job duties would bring to light additional questions — themselves potentially numerous — which would also be difficult to defend as job-related.

76. A difference of a single point on a test may determine whether a particular candidate will be promoted, and how long he or she may have to wait for a promotion.

77. The problem of there being numerous test questions, the job-relatedness of which is open to substantial doubt, is important in itself but takes on added importance because of the adverse light it sheds on the degree of care with which the entire examinations were constructed.

2. *The City's Knowledge of its Problems in Showing that the Fire Department Examinations, Prepared in the Same Manner as the Police Department Examinations At Issue Herein, Were Job-Related*

78. The City's preparation of promotional examinations for both its Police and Fire Departments is governed by Chapter 143 of the Texas Local Government Code. The examinations for both Departments are prepared by the same City Personnel Department officials, in the same manner. Book committees are established by each Department to pick the volumes which promotional candidates are to study. Candidates are supposed to study the books over a period of time, committing as much as possible to rote memory. Multiple-choice test items are written, based on the information in the books.

79. Because Fire and Police Department promotional examinations are prepared in the same manner, by the same persons, and under the same standards, the City's experience

in 1990 and 1991 in attempting to show that the Fire Department's promotional tests were job-related is relevant to the question whether the Police Department's promotional examinations were job-related.

80. The City's study of the Fire Department's examinations occurred in the course of litigation against those examinations, *Houston Chapter of the International Association of Black Professional Firefighters v. City of Houston*, C.A. No. H-86-3553 (S.D.Tex.). The City's expert, Dr. Jeanneret, performed a criterion-related validation study of the promotional examinations for the two lowest-level promotional ranks, Chauffeur and Junior Captain, and found some statistically significant positive relationships between test scores and research ratings of job performance which supervisors made under his direction.

81. Plaintiffs' experts in that case were Charles R. Mann, Ph.D., an expert statistician, and David L. Friedland, Ph.D., an expert industrial psychologist. Dr. Friedland has previously helped to develop selection tests in urban public safety departments. Their March and April 1991 Affidavits recounting some of their analyses were introduced in evidence at the fairness hearing prior to final approval of the settlement in that lawsuit. The Affidavits have also been received in evidence here,[19] and Drs. Mann and Friedland testified about those analyses at the fairness hearing herein.

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19 Plaintiffs' exhibits 18, 19, and 20.

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82. Dr. Mann's March 29, 1991 Affidavit[20] stated that the November 1990 Report prepared by the City's expert in the Fire Department case described a total of 11 performance dimensions. For example, the report states at p. 7:

> A dimension is a general term used to represent important work behaviors common to performance of several job tasks. Performance dimensions are the general categories of behavior often used to distinguish workers who are successful or effective from those workers who are less successful or less effective on the job.

Dr. Jeanneret also stated on p. 8 of his November 1990 Report that each performance dimension "was divided into five blocks labeled Very Good, Good, Average, Poor, and Very Poor." Dr. Mann also noted from Appendix D to Dr. Jeanneret's November 1990 Report that he established the following dividing lines for his adjectival characterizations of employee performance:

Range of Points	Characterization of Performance
1-12	Very Poor
13-24	Poor
25-36	Average
37-48	Good
49-60	Very Good

20. Plaintiffs' exhibit 18.

Id., 43-44. Because Dr. Mann's field of expertise is statistics and not industrial psychology, he expressed no opinion (a) on the manner in which Dr. Jeanneret established his performance dimensions, or (b) on the meaning of those dimensions, or (c) on Dr. Jeanneret's adjectival characterizations of various levels of ratings. *Id.*, ¶ 50.

83. Dr. Mann further explained that a Pearson product-moment correlation may be used to measure the strength of the linear relationship, if any, between continuous variables such as test score and job performance ratings.[21] *Id.*, ¶ 52.

84. A correlation of 1 corresponds to a perfect positive linear relationship between the variables, in which the increase in one variable is directly proportional to the increase in the other variable, at every point along the continuum of values. A correlation of -1 corresponds to a perfect negative linear relationship between the variables, in which the increase in one variable is inversely proportional to the decrease in the other variable, at every point along the continuum of values. A correlation of 0 indicates that there is no linear relationship between the two variables. *Id.*, ¶ 53.

85. A correlation can be any number between -1 and +1. The square of the correlation of two variables (the "coefficient of determination") is the proportion of the variation in one variable which can be "predicted" or "explained" by the other variable. In correlating test scores with job ratings, for example, a correlation of .3 "predicts" or "'explains" 9% of the variation in job ratings. *Id.*, ¶ 54.

21. Correlations between test scores and performance measures are commonly referred to as "validity coefficients" by psychologists.

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86. The magnitude of an observed correlation is not meaningful unless there is reason to believe that it did not differ from zero merely by chance. In order to consider the true correlation as opposed to its observed value, it is necessary to perform a test of statistical significance of the hypothesis that the true value of the correlation coefficient is zero. *Id.*, para, 55,

87. The closer to zero the correlation, the less useful to the employer is the test and therefore the more difficult it is to justify adverse impact against minorities or any other cost of using the test. Whether a particular correlation is sufficiently high to justify the use of a test, given the test's degree of adverse impact, requires a value judgment outside the field of statistics. As a rule of thumb, however, statisticians commonly advise their clients that correlations less than .3 (those which do not "explain" or "predict" at least 9% of the variation) are not practically useful in many situations. *Id.*, ¶ 56.

88. There are, however, situations in which having any information at all is extremely important, and a statistically significant correlation may be important even though the correlation is extremely low. For example, the failure rate of a critical aircraft engine component may have a very loose, but real, relationship with the operating temperature of the engine. This relationship may reasonably lead the engine builder to re-design the component or modify the engine to have a lower operating temperature. The above information is provided for purposes of illustration; ultimately, the value judgment as to the utility of a low correlation must be made outside the realm of statistics, by a person taking into account all of the relevant considerations. *Id.*, ¶ 57.

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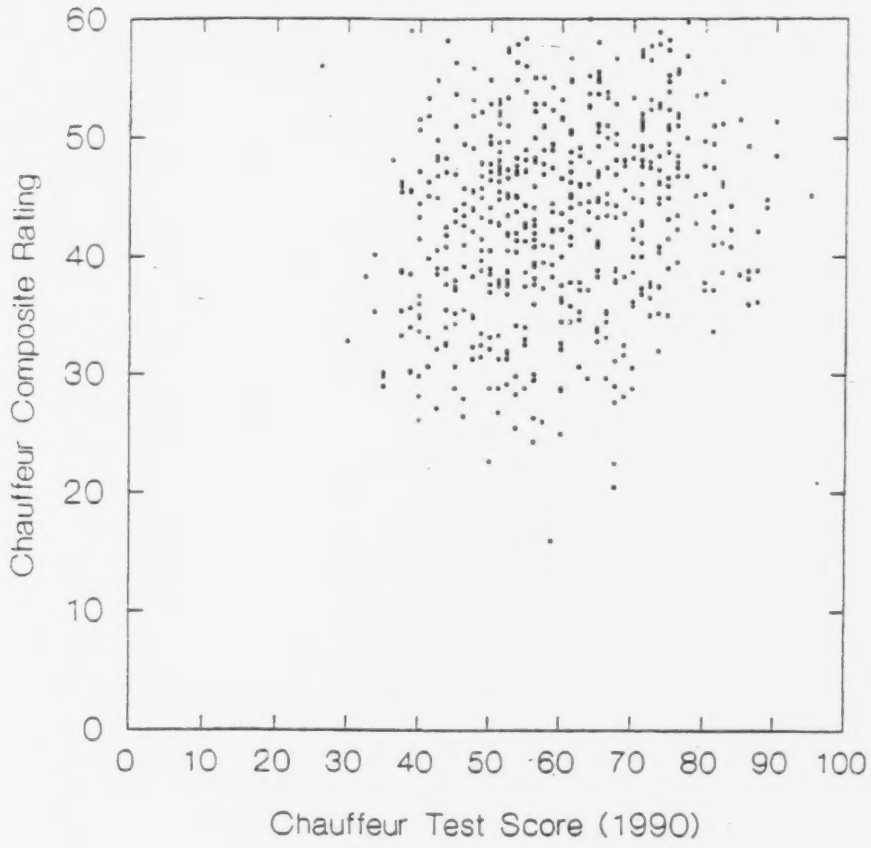
89. Dr. Mann found a number of problems with the data and approach used by Dr. Jeanneret, but was asked to ignore those problems, accept for purposes of argument the raw data prepared by the City's expert, and to carry out further analyses using those raw data. *Id.*, ¶¶ 58-71.

90. For the sake of brevity, Dr. Mann's analysis of the data for the 1990 Chauffeur test will be used as illustrative of his analyses for all of the other challenged tests in that case. A large number of candidates took this test, reducing the risk of random fluctuations. Dr. Mann found the following correlations between test scores and job-performance ratings on the Chauffeur composite — that set of dimensions of job behavior which according to the City' expert captured performance on those parts of the Chauffeur job which were most important. Dr. Mann found a .209 correlation between test scores on the 1990 Chauffeur examination and the "Chauffeur Composite" performance rating. *Id.*, ¶ 72. He concluded from the results on this and the other tests that "These correlations are sufficiently low that I believe additional justification is needed before using results based on them."

91. A scatterplot showing test scores and job performance ratings for the 1990 Chauffeur test appears on the next page. Each point shown on a scatterplot represents one or more persons with a particular job performance rating and a particular score on the test in question. The rank for which the examination was given is shown on the vertical axis, with the full scale from 0 to 60 represented. Test scores from the examination or test aggregate in question are shown on the horizontal axis, with the full scale from 0 to 100

represented. A person with a Chauffeur composite rating of 50 and a 1990 Chauffeur test score of 70 will appear on the scatterplot for the 1990 Chauffeur examination as a point at the intersection of 50 on the vertical scale and 70 on the horizontal scale. The scatterplot for the 1990 Chauffeur test (Attachment 4 to Dr. Mann's Affidavit) is shown below:



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92. The scatterplot shows visually that there are numerous test-takers with relatively high performance ratings but relatively low test scores, and that there are numerous test-takers with relatively low performance ratings but relatively high test scores. The relationship between test score and job performance is not a close one. This scatterplot also confirms visually the weakness of the .209 correlation found for this test. *Id.*, ¶¶ 92-93.

93. Dr. Mann also prepared a set of bar charts showing mean performance ratings for written test-score intervals or bands of 25 persons.[22] Where the 25th person in a test-score band had the same test score as one or more persons not already in the band, the additional persons were included in the band in order to eliminate any breaking of ties. Thus, every band but the last includes a minimum of 25 persons. The last test-score band on each page shows information for the from 1 to 25 persons remaining. These bar charts show the size of the differences between mean performance ratings of persons in different test-score bands. The chart for the 1990 Chauffeur test appears on the next page.

94. The mean Chauffeur Composite performance rating for the 31 firefighters scoring from 81 to 93 (the top 1990 written test score achieved) on the 1990 Chauffeur test was 43.72 points on the 60-point scale. This mean performance composite rating was almost five points lower than the mean rating of 48.46 points obtained by the 26 firefighters scoring from 76 through 80 on that test, and was more than three points *lower* than the mean job performance rating of 47 points obtained by the 33 firefighters

22. *See* Attachment 5 to Dr. Mann's Affidavit.

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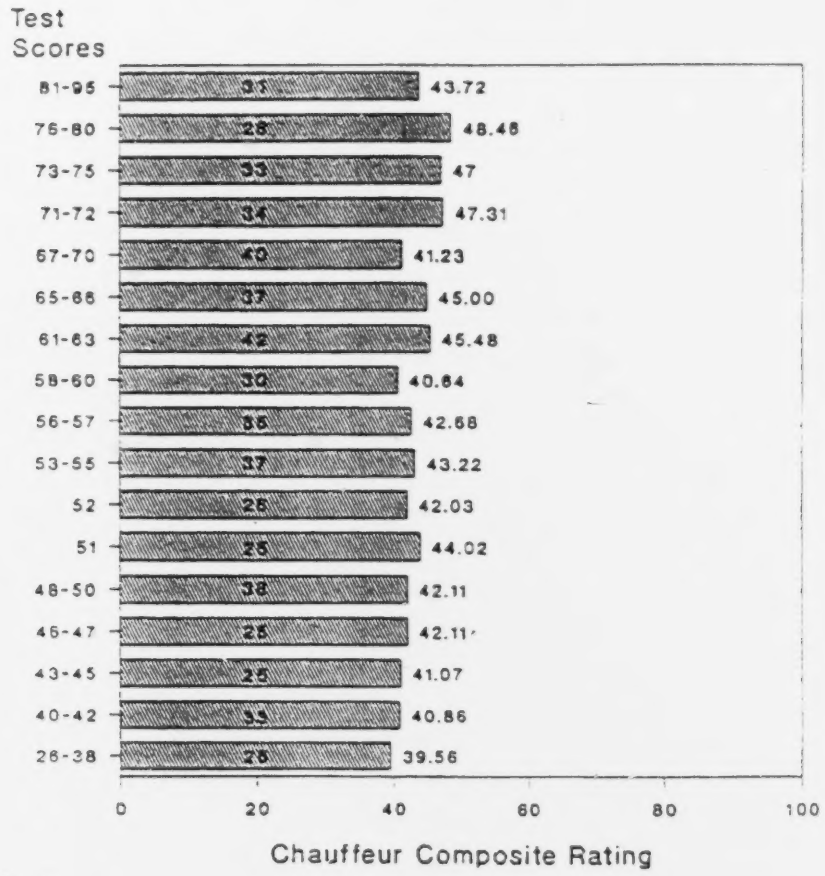
Mean Performance Ratings of 1990 Chauffeur Test Score Groups All Test-Takers



Note:
n = 542
Group size = 25 + ties

scoring from 73 to 75 on the written test. Indeed, one has to go down to the firefighters scoring from 67 to 70 on the written test to find a mean job performance rating lower than that achieved by the top scorers. Some bands of firefighters with failing test scores had higher mean job performance ratings than the top-scoring firefighters. *See, e.g.*, the 37 firefighters scoring from 65 to 66 (mean job rating of 45), the 42 firefighters scoring from 61 to 63 (mean job rating of 45.48), and the 25 firefighters scoring exactly 51 (mean job rating of 44.02).

95. While there is a general gross trend in which bands of firefighters scoring lower on the test have lower job-performance ratings, these are chiefly distinctions among the top group of 125 or so firefighters with scores ranging from 71 to 95, the large middle group of 335 or so firefighters with scores ranging from 46 to 70, and the bottom 83, with scores ranging from 26 through 45. Even there, the level of the difference is just a few points on a 60-point scale, and it is not clear that this is a meaningful difference in job performance. This information tends to suggest that, even if differences of a few points in performance ratings are practically meaningful, the test may be useful only in making gross distinctions among persons with relatively large differences in test scores.

96. Dr. Mann's staff also divided the Chauffeur test-takers for a given examination into five equal sets or quintiles, in order of their performance ratings, in order to compare the mean test scores of firefighters with the same level of job performance. *Id.*, ¶ 99. The bar chart for the 1990 Chauffeur test, from Attachment 7 to the Affidavit, is on the next page:

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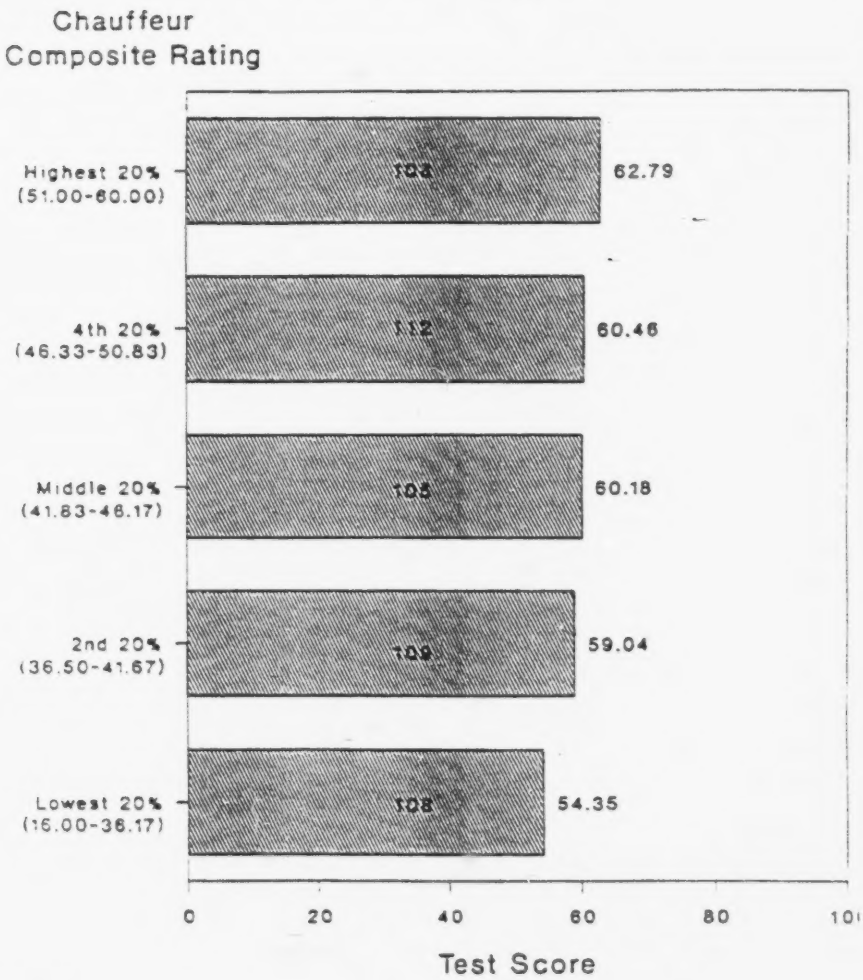
Mean 1990 Chauffeur Test Score by Chauffeur Composite Rating All Test-Takers



n = 542

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There was very little difference in mean test scores among the highest-performing 60% of firefighters.

97. The next two bar charts drawn from Attachments 9 and 11 to Dr. Mann's Affidavit use the same job-performance quintiles, and compare the proportions of firefighters in the different job-performance groups who pass or who fail the test. *Id.*, ¶¶ 102, 105. There is very little difference among the middle three quintiles in the proportions of firefighters passing or failing the test. The gross differences shown in the charts are among the top quintile, the large middle group, and the bottom quintile.

98. One of the interesting features of the charts is that the great majority of firefighters at all levels of job performance fail the test. In the highest-performing group of firefighters, close to 63% fail the test.

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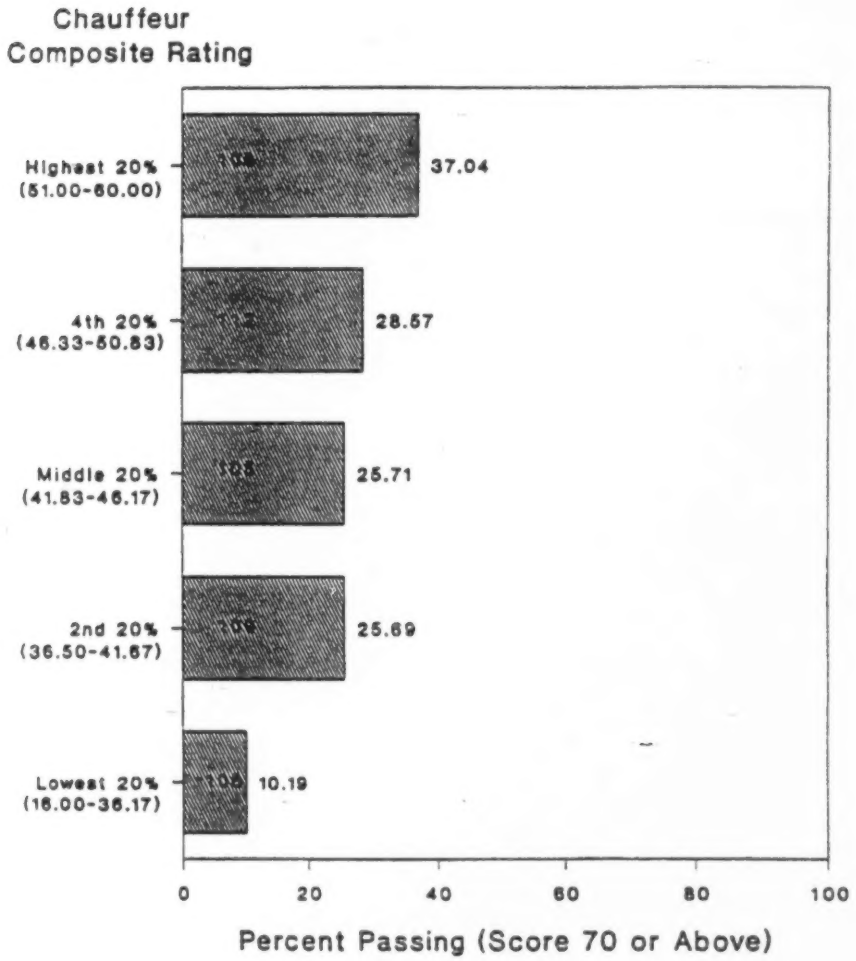
1990 Chauffeur Test: Percent Passing by Chauffeur Composite Rating All Test-Takers



n = 542

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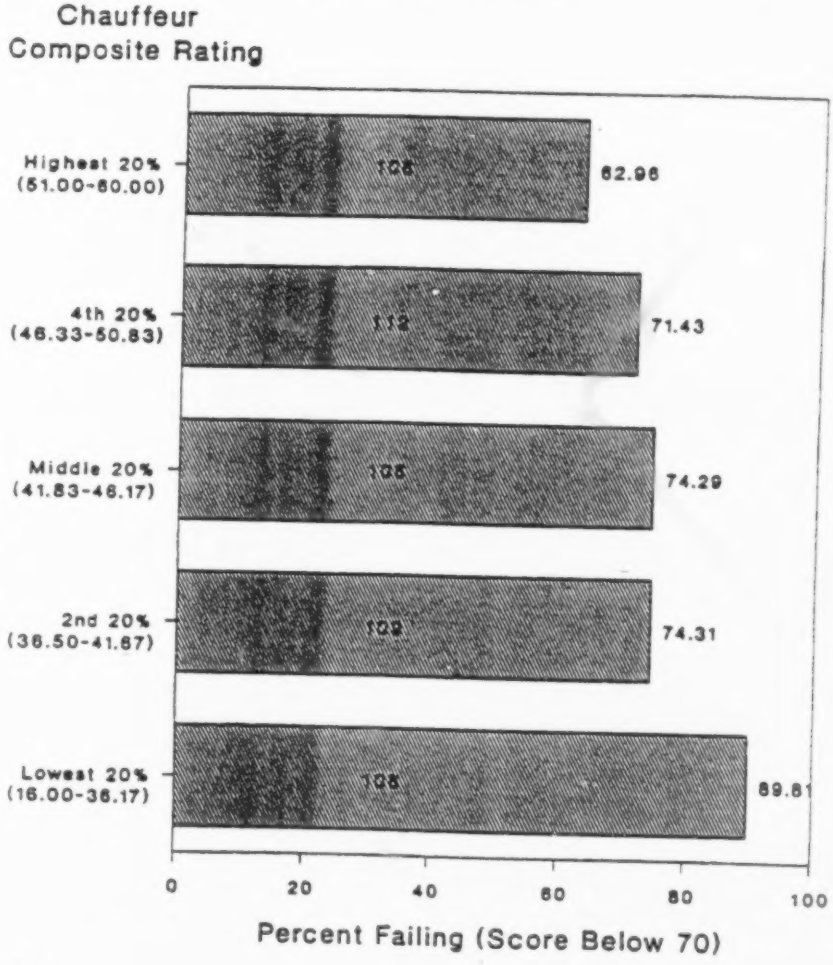
1990 Chauffeur Test: Percent Failing by Chauffeur Composite Rating All Test-Takers



n = 542

99. Dr. Mann's office then prepared bar charts with the same job-performance quintiles as before, but showing test-passing rates separately by race for the persons in that quintile. *Id.*, ¶¶ 112-113. The chart for the 1990 Chauffeur test, taken from Attachment 15 to the Affidavit, is set forth below.

100. For firefighters in the highest-performing group, 43.42% of whites, compared to 38.4% of Hispanic-Americans and only 10.53% of African-Americans, passed the test. *Whites passed the test more than four times as often as African-Americans performing on the job at the same high level.*

101. For firefighters in the lowest-performing group, 16.36% of whites, compared to 0% of Hispanic-Americans and only 3.03% of African-Americans, passed the test.

102. In every one of the five job-performance bands, whites passed the test substantially more often than Hispanic-Americans, and substantially more often than African-Americans, who were performing their jobs at the same level.

103. Whites in the *poorest*-performing group of fire-fighters passed the test at a rate *higher* than African-Americans in the *best*-performing group of firefighters.

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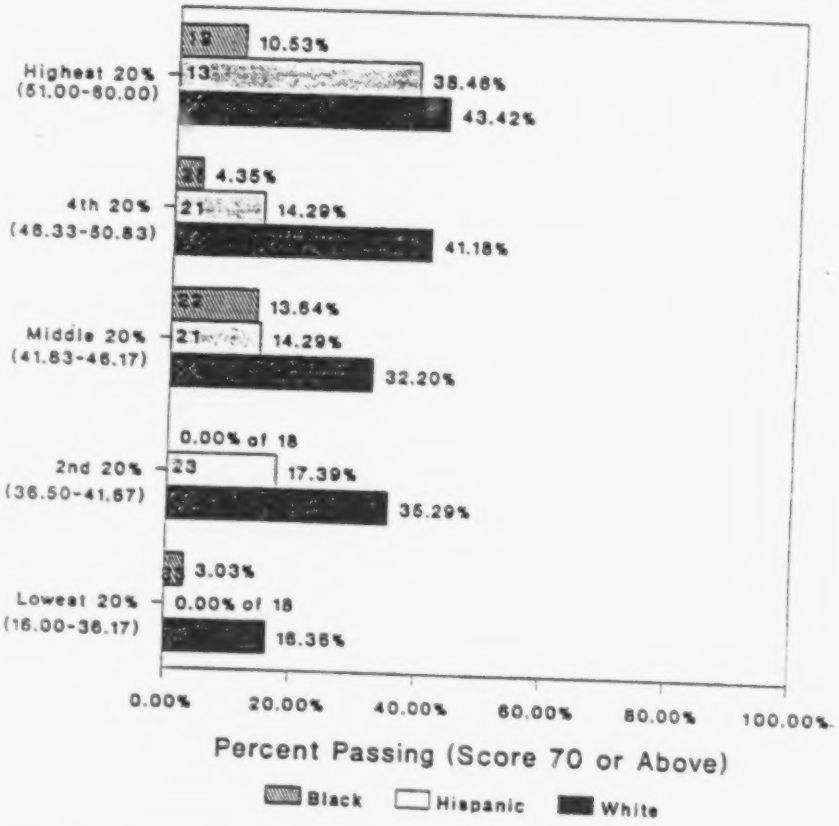
1990 Chauffeur Test: Percent Passing by Race by Chauffeur Composite Rating All Rated Test-Takers



n = 537, Includes Blacks, Hispanics and Whites Only

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104. Dr. Mann's office also prepared a series of charts showing the range of written test scores for firefighters within each of the five Chauffeur-composite performance quintiles.[23] The chart for the 1990 Chauffeur test is reproduced below. It shows that, among the highest-performing fifth of firefighters, the test scores obtained range from a low of 26.25 to a high of 90. Among the lowest-performing fifth of firefighters, the range of test scores ran from 30 to 87.5. There was a great deal of overlap in the ranges of test scores obtained by firefighters in the five different performance bands. Median test scores, *i.e.*, the points at which half the test scores are above the point and half are below, are indicated by a horizontal line. *Id.*, ¶¶ 2-5.

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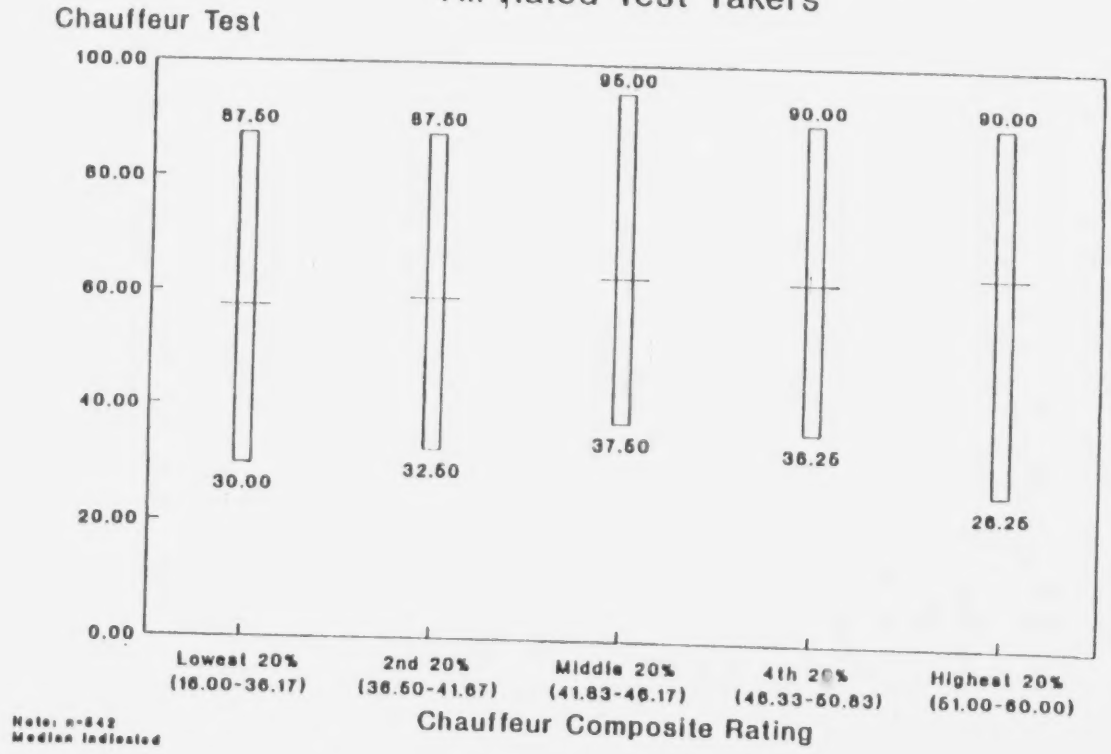
23. April 20, 1991 Supplemental Affidavit of Dr. Mann, plaintiffs' exhibit 19.

1990 Chauffeur Minimum and Maximum Score by Chauffeur Composite Rating Quintile All Rated Test Takers



Note: n=842
Median Indicated

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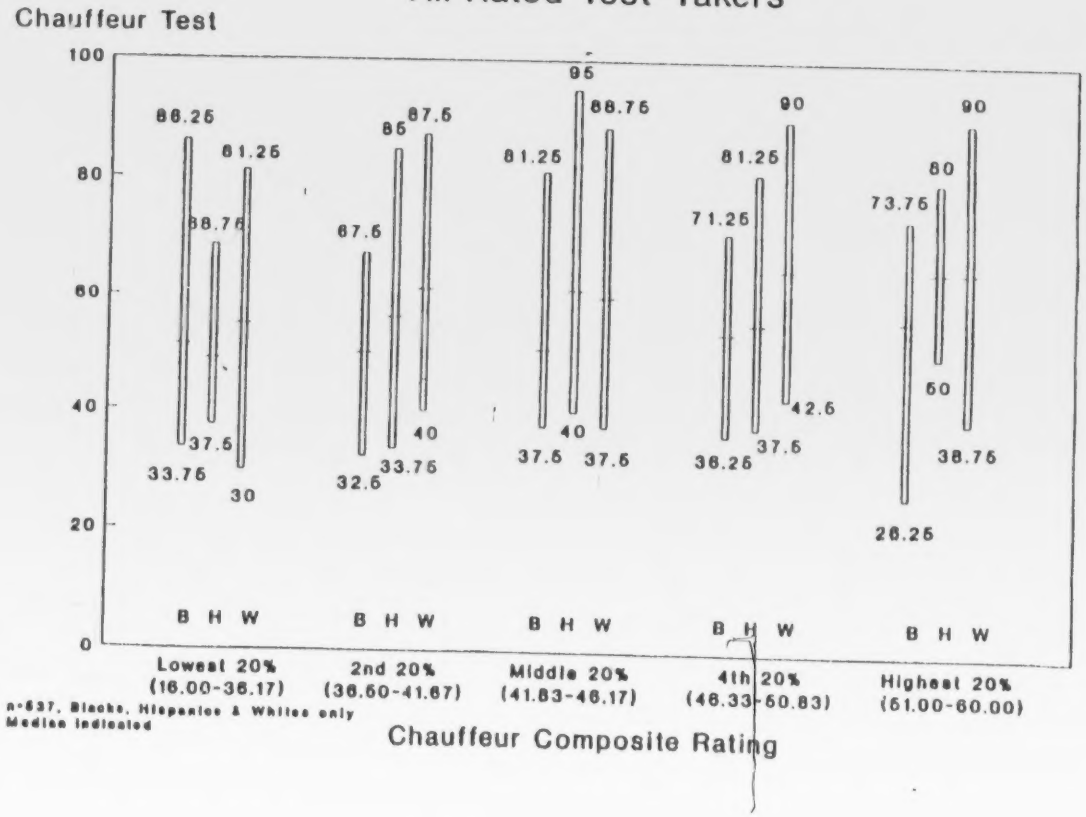
105. The same type of chart was then prepared with the information broken down by race. *Id.*, ¶¶ 6-7. The leftmost vertical bar in each cluster shows information for African-Americans, the middle vertical bar in each cluster shows information for Hispanic-Americans, and the rightmost vertical bar in each cluster shows information for whites. The chart for the 1990 Chauffeur test is reproduced below:

1990 Chauffeur Minimum and Maximum Score by Chauffeur Composite Rating Quintile All Rated Test-Takers



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106. Dr. Mann stated his observations as follows in ¶ 7:

> Across all of these eight charts, the top of the range of written test scores obtained by whites within a performance-rating group exceeded the top of the range of written test scores obtained by blacks within the same performance-rating group in all but one combination of test and rating group.[24] For all but two combinations of test and rating group,[25] the top of the range of written test scores obtained by whites within a performance-rating group exceeded the top of the range of written test scores obtained by Hispanics within the same performance-rating group.

107. The characteristics described above are not usually considered the hallmarks of valid and fair tests.

108. Dr. Mann stated in his Affidavit, ¶ 115, that, based on the types of charts described above, and considering the information provided in the analysis of the City's expert, he saw no statistical justification for the passing cut-off score of 70 on the challenged promotional tests, or for making promotions of test-passers in rank order of their test scores and seniority points.

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24. The exception was the lowest 20% rating group on the 1990 Chauffeur test.

25. The exceptions were the 1988 Chauffeur test, 4th 20% group, and the 1990 Chauffeur test, middle 20% group.

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109. Plaintiffs have shown substantial doubt as to the job-relatedness of the challenged examinations. It is not necessary for the Court to review this evidence in further detail.

110. The objectors have not presented any credible evidence of the job-relatedness of the challenged examinations.

F. *The Remedial Promotions*

111. Under the terms of the Consent Decree, African-Americans and Hispanic-Americans who took an examination for Sergeant from January 1, 1982 to date, and who passed at least one examination for this rank, will receive a total of 96 remedial promotions; African-Americans and Hispanic-Americans who took an examination for Sergeant from January 1, 1982 to date, and who were promoted after a discriminatorily long waiting period which delayed their ability to compete for Lieutenant promotions will receive five remedial promotions to Lieutenant; and African-Americans who took an examination for Lieutenant from January 1, 1982 to date, and passed at least one examination for this rank, will receive a total of 5 remedial promotions. The named plaintiffs in this lawsuit who meet the necessary conditions shall have priority in receiving these promotions, and the remainder of the promotions shall be made in rank order from among those unpromoted African-Americans and Hispanic-Americans passing at least one of these tests, in accordance with the schedule set forth in the Consent Decree, as modified below. There will not be any back pay.

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112. The number of remedial promotions is the same as the number of promotions which were lost to African-Americans and Hispanic-Americans because of the adverse impact of the promotional tests from 1982 through 1991. The Court's ruling that this case would be limited to promotional examinations given from January 1, 1982 on means that there are no remedial promotions as a remedy for any adverse impact of the promotional examinations prior to 1982.

113. The parties have directed the attention of the Court to an error in Table 18 on p. 22 of the Consent Decree. The total of 62 remedial promotions to the rank of Sergeant for African-Americans is the agreed total, and represents the aggregate shortfall in promotions for African-Americans from 1982 through 1992. However, the allocation for each particular test is based on the shortfall for that test, which leads to a larger number. *See* the explanation in ¶ 17 of the Consent Decree. Accordingly, the allocations of remedial promotions of African-Americans to Sergeant in Table 18 of the Consent Decree must be adjusted downwards, so that the aggregate number of such promotions remains 62. The adjustments will have the least impact on individuals if done on those tests with the largest allocations. Accordingly, Table 18 is revised as follows:

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Table 18. Allocation of the Remedial Promotions to Sergeant

Sergeant Examination	Number of Vacancies	
	Blacks	Hispanics
9/23/82	5	0
11/17/83	8	7
1/31/85	10	7
7/17/86	6	2
10/29/87	7	7
4/27/89	10	1
10/31/91	16	10
Total	62	34

114. The Consent Decree provides the mechanism by which the class members receiving remedial promotions are to be identified. Plaintiffs will prepare the tentative list according to those rules, subject to checking by the City. In the event that the parties are unable to agree, the Court can resolve any disputes. There is no indication, however, of any reason why the parties should be unable to reach agreement on the application of these rules.

115. Some objectors have raised the concern that normal promotions will cease because of the remedial promotions. This is not correct.

116. Some objectors have raised the concern that police officers may be demoted in order to make remedial promotions possible. This is not correct. The parties have

jointly represented to the Court that there will never be any demotion or layoff in order to make any remedial promotion possible. The proposed Consent Decree does not contain any "bumping" provision.

117. Some objectors have complained that the particular officers who will receive the remedial promotions have not yet been identified and their names made public. The publicizing of the names would add nothing to the question of the fairness of the proposed Consent Decree, and this objection is rejected.

118. Some objectors have complained that it is not clear at what point in the year any set of remedial promotions will be made. The Consent Decree provides the Police Department with the flexibility to make these promotions within a given year when it sees fit. There is no unfairness to any officer in allowing the Police Department to exercise flexibility.

119. Some objectors have complained that they do not know the source of the positions to be filled by remedial promotions. The source of their concern is that the remedial promotions will fill some vacancies which would otherwise be filled from promotional registers.

120. The parties have gone to great lengths to accommodate the promotional expectations of officers who are not members of the plaintiff class:

a. they have not proposed a promotional goal in which any particular percentage of future promotions

will be reserved for African-Americans or Hispanic-Americans;

b. they have agreed to a settlement in which there is still likely to be adverse impact against them on future examinations. The degree of the adverse impact should be ameliorated by the provisions of the Decree, but it is not likely to be eliminated entirely;

c. the parties have not proposed that all of the remedial promotions be made immediately, but have agreed to a five-year schedule, with some flexibility in the Police Department to shorten the schedule if it sees fit. Given that some class members have been waiting eleven or more years for their promotions already, this is a concession of great magnitude. This concession allows normal promotions of other officers to proceed on a regular schedule, even if in reduced numbers.

121. Some officers who took some of the challenged promotional examinations object to the remedial promotions of African-American and Hispanic-American officers who took the same remedial examinations, on the ground that such African-American and Hispanic-American officers received lower scores on the examinations than they received. They object that they are being by passed. *E.g.*, objection of Charles Johnson, Tab 52, paragraph 6 in Vol. II of the objections to the settlement. The remedial promotions are intended by the parties to provide a partial remedy for examinations which have been shown to cause substantial adverse impact against blacks and Hispanics, in circumstances in which plaintiffs have presented substantial evidence that the examinations

are not job-related. There is nothing unfair to white promotional candidates on the same examinations that they do not share in the remedial promotions, because there was never any adverse impact against whites on these examinations such that remedial promotions would be justified. Moreover, plaintiffs have presented substantial evidence tending to show that relative differences in test score are not a meaningful indicator of comparable differences in job performance.

122. The remedial promotions are narrowly tailored to accomplish the purpose of remedying plaintiffs' claims of testing discrimination. They do not unduly trammel the interests of police officers who are not members of the plaintiff class.

G. *Remedial Seniority*

123. The proposed Consent Decree provides that class members on the remedial promotion list, including those who will be barred from receiving remedial promotions because they can be reached on a register of eligibles, will receive back seniority in rank to compensate them for some of the injury suffered because of their delays in receiving promotions.

124. Some objectors have complained that allowing remedial seniority to class members harmed by these tests in the past will reduce the benefit of their own seniority. This is a natural consequence of any seniority relief.

125. Remedial seniority is necessary to place class members in the position they would have held if there had

never been any testing discrimination. This relief is narrowly tailored to accomplish its remedial objective, and does not unduly trammel the interests of other officers.

H. *The Reduction of Adverse Impact in the Future*

126. The proposed Consent Decree seeks during the next ten years to reduce the amount of adverse impact against AfricanAmericans and Hispanic-Americans taking examinations for Sergeant and for Lieutenant (a) by striking "biased items", i.e., those questions identified by a statistical analysis devised by the City's expert in the *Houston Chapter* case, which have substantial adverse impact against any race, white as well as African-American or Hispanic-American, and which are not equally predictive of job performance for all races; and (b) by extending the life of promotional registers during this period of time to two years.

127. In the *Houston Chapter* case, Dr. Mann attempted to estimate the possible effect of this procedure on the reduction of adverse impact in the future. He applied the procedure to the results of the 1983, 1984, 1988 and 1990 Chauffeur examinations, and to the 1982, 1984, 1988 and 1990 Junior captain examinations. The analysis was a hypothetical analysis for each of these eight sets of examination data. Hypothetical new scores were obtained, and the test-takers' then actual seniority points were added to the hypothetical scores in order to obtain a hypothetical new set of rankings.

128. While application of the new procedure reduced the adverse impact of these examinations, adverse impact

against African-Americans and Hispanic-Americans still remained. Some questions were hypothetically eliminated from the test because they worked to the detriment of whites and were not valid items.

129. No test item will be stricken because it has adverse impact against any group, *i.e.*, because the proportion of white test-takers answering it correctly is much larger than the proportion of African-American or Hispanic-American test-takers who answer it correctly. A test item will be struck only if it is a biased item. Test items with large racial differences in the rates at which particular groups answer them correctly will remain on the test if they are valid items.

130. The elimination of biased items improves the quality, of the test, and makes it a better predictor of job performance. In Dr. Friedland's phrase, it helps to remove race as a factor in the test scores.

131. Asian-Americans and women have asked to be included in the analyses of biased test items. The City is free to include them in the analyses whenever there are sufficient numbers of Asian-Americans and women to make such an analysis meaningful, but this is a voluntary decision for the City. This case does not encompass discrimination against Asian-Americans or against women.

132. The extension of the test registers to two years benefits every officer who passes the test, because it increases their opportunity for promotion.

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133. The provisions in the Consent Decree providing a means for the elimination of biased items are narrowly tailored to accomplish the remedial purposes of the Consent Decree, and do not unduly trammel the interests of any officers who are not members of the class.

I. *The Provisions of State Law*

134. The proposed Consent Decree supersedes some provisions of the Fire and Police Civil Service Act, Texas Local Government Code chapter 143, as amended, [hereinafter, "Chapter 1430"] while leaving many other provisions unaffected.

135. Plaintiffs have shown substantial doubt as to the job-relatedness of the City's promotional examinations for Sergeant and Lieutenant. Nevertheless, the proposed Consent Decree allows the City defendants (a) to continue compiling promotional examinations for these ranks in the manner set forth in Chapter 143; (b) to continue using a passing cut-off score of 70% correct, as provided by Chapter 143; (3) to continue the use of seniority points as provided in Chapter 143; and (4) to continue using test scores, in conjunction with the seniority points, to rank-order promotional candidates, as provided in Chapter 143.

136. The Consent Decree also allows the City to explore, and to consult with all other employee groups as well as with plaintiffs, alternative selection procedures as authorized by Chapter 143.

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137. Paragraph 55 of the proposed Consent Decree makes two major changes and several minor changes from the operation of Chapter 143. *First*, it provides a mechanism for striking from the test those items which the City identifies as biased items, *i.e.*, those which have a high degree of adverse impact against any race and which are not job-related for all races. This is an expansion of the power the city already has under chapter 143 to strike improper test items or to score additional responses as correct. The result should be to improve the test and make it a more accurate predictor of job performance in the promotional rank. This is a necessary change for the reduction of adverse impact from these tests, and is compatible with the purposes of merit selection underlying Chapter 143.

138. *Second*, ¶ 55(g) of the proposed Consent Decree provides that promotional registers of test-passers resulting from use of the new selection procedures shall remain in effect for a period of two years unless such lists are earlier exhausted. Because the disparate impact of the challenged examinations results in whites scoring disproportionately at the top of promotional registers, and passing African-American and Hispanic-American candidates scoring disproportionately lower down, a one-year extension in the life of these promotional registers is a necessary change for the reduction of adverse impact from these tests. This remedy, and the striking of biased test items, are far less burdensome to nonminorities than an injunction against the tests and a requirement that the City develop entirely new selection procedures.

139. *Third*, there are several minor changes. The need to perform statistical analyses of responses and to examine test items for bias necessitates a short postponement of release of the test results. Here, the policy of Chapter 143 has been preserved to the greatest possible extent by the requirement in ¶ 55(f) of the proposed Consent Decree that the City post an eligibility list as soon as possible. The provision of ¶ 55 (a) of the proposed Consent Decree requiring ninety days' notice of a firm date for the examination and of the books to be studied is intended to ensure that all officers have an adequate and definite time period within which to study for the examination, and is fully compatible with the purposes underlying Chapter 143.

J. *The Airport Police*

140. Terry Hughes and the Houston Airport Police Officers' Association have filed an objection to the Consent Decree which is limited to the provisions of Paragraph 61 entitled "Reclassification of Peace Officers." The essence of their objection is that Paragraph 61 will deny the Airport Police Officers the right to transfer and become Classified A Officers in the Houston Police Department. This claimed right stems from the judgment of the 280th District Court of Harris County. Texas, allegedly granting them equal transfer rights. (Plaintiffs' Exhibit No. 21). The Court does not conclude that this judgment grants any right which Paragraph 61 curtails. However, even if it does curtail any existing right, Paragraph 61 is essential to the viability and practicality of the Consent Decree. The Decree strikes a delicate balance between the competing interests of minorities receiving remedial promotions with retroactive

seniority benefits and of nonminorities seeking to obtain promotions through the regular competitive process who are concerned with preserving their own seniority rights under the civil service system. In light of these competing interests, the Court finds that Paragraph 61 will be essential to maintain that balance and avoid additional disruption by the merger of other specialized police divisions as Class A officers. Such a restric-tion as contained in Paragraph 61 is reasonable and necessary to the implementation of the Consent Decree which is of a limited duration.

K. *Objections that the Proposed Consent Decree Does Not Provide Sufficient Relief*

141. McCloy Medlock, Richard Humphrey, Willie Fields, and Bennie L. Green, four of the plaintiffs in the *Comeaux* action, have filed a Motion to Substitute Attorney, Objections to Order of Dismissal, Objections to Consent Decree, and First Amended Objections to Consent Decree.[26] The First Amended Complaint in Comeaux, filed on December 29, 1973, described their individual claims at 5-6 as follows:

> Plaintiff Fields would show that although he passed the Detective's examination, he was denied a promotion because of the HPD's discriminatory promotional practices. In addition, plaintiff Fields was denied a transfer to another department for which he was fully qualified and was denied because of his race.

* * *

26. Objections to Proposed Consent Decree, vol. II, tab 60.

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Plaintiff Green would show that he was not treated equally with White officers in the Department with regard to terms and conditions of employment solely on the basis of his race and has suffered because of Defendants' subjective efficiency rating system which affects Blacks disparately and limits their mobility within the Department.

* * *

Plaintiff Humphrey would show that although he took the Lieutenant's exam and scored well, he was denied a promotion to Lieutenant because of the HPD's subjective testing and qualifying practices and procedures.

* * *

Plaintiff Medlock would show that even though he took the Lieutenant's examination and scored well, he was denied a promotion to Lieutenant because of HPD's discriminatory promotional practices and procedures utilizing subjective tests and efficiency ratings.

142. Plaintiffs' exhibits 9 and 10 show the following:

a. Willie E. Fields failed the Sergeant tests given in 1975 and 1977, passed the 1979 Sergeant test with a rank of 97, and failed the Sergeant tests given in 1983 and 1985.

b. Bennie Lee Green passed the 1979 Sergeant test with a rank of 86, and failed the 1980, 1981, and 1983 Sergeant tests.

c. Richard C. Humphrey passed the 1976 and 1977 Lieutenant tests with ranks of 69 and 66, respectively. It is unclear whether he passed the 1978 Lieutenant test. He failed the 1979 and 1980 Lieutenant tests.

d. McCloy Medlock passed the 1975 Lieutenant test with a rank of 45, passed the 1976 Lieutenant test with a rank of 43 ("Meloy Medlock" is probbaly the same person as McCloy Medlock), and passed the 1979 Lieutenant test with a rank of 26.

143. The case in which these objectors were named plaintiffs had had no active prosecution apparent on the docket entries for a decade prior to the attempt by the plaintiffs herein to intervene in the lawsuit. It would not be reasonable to delay or cancel the proposed relief for persons who actively sought to press their rights, in favor of persons who did not press their rights. The Court makes no findings herein as to the relative responsibility of client and counsel in *Kelley* for the failure to press that action, but will not allow this objection to stand in the way of final approval of the settlement.

144. Plaintiff Jammer objects to the provision of ¶ 37 of the Consent Decree stating that no plaintiff or class member can receive a remedial promotion unless he or she passed one of the challenged tests. Plaintiff Jammer was promoted to Sergeant on October 15, 1988. Thereafter, he failed the 1991 and 1992 Lieutenant tests.

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145. Recognizing that there are serious problems with the promotional tests and their passing level, but that there is no presently available alternative means of demonstrating basic qualification for promotion in the eyes of other members of the Department, only plaintiffs and class members who have passed a test will be eligible to receive a remedial promotion. It is an imperfect mechanism, and in its application to an individual may incorrectly disqualify that individual from relief. It is the only available tool for the purpose, however. In light of the number of remedial promotions, this is important. The compromise embodied in ¶ 37 of the Consent Decree is appropriate.

L. *Procedural Fairness, and General Matters*

146. The evidence shows that the proposed Consent Decree was arrived at through arm's-length bargaining among well-represented parties.

147. Any conclusion of law which is more appropriately a finding of fact shall be considered a finding of fact.

II. *Conclusions of Law*

A. *General*

1. The Court has jurisdiction over this lawsuit.

2. The certification and definition of the plaintiff class under Rule 23(b)(2), F.R.Civ.P., remains appropriate, and is hereby made final.

3. The Notice provided herein meets the standards of the Constitution and of Rule 23, F.R.Civ.P.

4. Any finding of fact which is more appropriately a conclusion of law shall be considered a conclusion of law.

B. *The Legal Standards Applicable to the Approval of a Consent Order Providing for Race-Conscious Relief*

5. The proposed Consent Decree involves two types of race-conscious provisions. *First*, it provides for 106 remedial promotions. *Second*, it provides for a ten-year period of time in which the elimination of future test questions for the ranks of Sergeant and Lieutenant biased against any race — whites, African-Americans or Hispanic-Americans — according to a methodology used by the City defendant's expert psychologist in the Houston Chapter case.

6. Voluntary affirmative-action programs memorialized in consent decrees are reviewed under the same standard as other voluntarily adopted affirmative-action plans. The Supreme Court's reasoning in *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 92 L.Ed.2d 344, 106 S.Ct. 3019 (1986), compels that the two types of voluntary plans be reviewed under the same test. In that case, the Court held that the fact that a voluntary affirmative action program was embodied in a consent decree did not render the program subject to § 706(g) of Title VII — the provision limiting the types of remedial orders courts can enter in Title VII suits — and that parties could voluntarily agree to a remedy that a court could not enter at the conclusion

of a Title VII litigation. The Court explicitly excluded consent decree programs from § 706(g) because they essentially mirrored the type of voluntary program approved in *Johnson v. Transportation Agency*, 480 U.S. 616, 94 L.Ed.2d 615, 107 S.Ct. 1442 (1987); it follows that the two kinds of programs should be reviewed under the same legal standard.

7. All courts of appeal which have decided this question have reviewed the two types of programs under the same standard. *See Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir., 1989); *Howard v. McLucas*, 871 F.2d 1000, 1006 (11th Cir., 1989); *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 note 23 (11th Cir., 1987). *But see Mann v. City of Albany*, 883 F.2d 999 (11th Cir., 1989) (declining to comment on the issue).

8. *Johnson* crystallized the legal standard for determining whether a race-conscious affirmative action plan comports with Title VII of the Civil Rights Act of 1964. Justice Brennan, writing for the Court, first noted that the party challenging an affirmative action plan bears the burden of proving the plan's invalidity. 480 U.S. at 626, 94 L.Ed.2d at 627. The opinion then articulated a two-prong test for determining a plan's validity:

> The first issue is . . . whether the consideration of the sex [or race or ethnicity] of applicants . . . was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." . . .
>
> * * *

> We next consider whether the Agency Plan unnecessarily trammeled the rights of male [or nonminority] employees or created an absolute bar to their advancement.

480 U.S. at 631, 637-38, 94 L.Ed.2d at 630, 634 (citations omitted). Though the decision does not specify precisely when an imbalance becomes sufficiently manifest, Justice Brennan took pains to point out that the "manifest imbalance" standard was less demanding than the showing necessary to support a prima facie case against the employer. 480 U.S. at 632-33, 94 L.Ed.2d at 631-32.[27] Justice Brennan drew on the Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193, 61 L.Ed.2d 480, 99 S.Ct. 2721 (1979),[28] to illustrate what manifest imbalance means:

> The difference between the "manifest imbalance" and "prima facie" standards is illuminated by *Weber*. Had the Court in that case been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's workforce would have made it vulnerable to a Title VII suit.

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27. In a concurring opinion, Justice O'Connor insisted that the two tests should be identical. However, since five Justices agreed to the less demanding standard articulated by Justice Brennan, his test represents the holding of the case.

28. *Weber* involved a Title VII reverse discrimination challenge to a voluntarily adopted affirmative action program under which an employer reserved for blacks half of the slots in the skilled craft-worker training program.

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> In order to make out a prima facie case on such a claim, a plaintiff would be required to compare the percentage of black skilled workers in the Kaiser workforce with the percentage of black skilled craftworkers in the area labor market.
>
> *Weber* obviously did not make such a comparison. Instead, it focused on the disparity between the percentage of black skilled craft workers in Kaiser's ranks and the percentage of blacks in the area labor force. 443 US, at 198-99, 61 L Ed 2d 480, 99 S Ct 2721. Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as minuscule in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination had been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities. Thus, in cases such as *Weber*, where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By comparison, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

480 U.S. at 633 note 10, 94 L.Ed.2d at 631 note 10. Inasmuch as plaintiffs have proven the disparate impact of the tests on

otherwise qualified African-American and Hispanic-American officers for the jobs at issue, see *infra*, this element of the test has been satisfied.

9. In assessing whether the plan unnecessarily trammeled the rights of nonminorities, the Court analyzed several factors. First, the Court noted the character and the extent of the preference given to the minorities. Specifically, the Court considered whether the preference would completely preclude the advancement of whites. Next the Court considered the extent to which the preference would frustrate the legitimate employment expectation of the disadvantaged nonminorities. And finally, the Court weighed the duration of the preference.

10. *Weber* is instructive on the issue whether the proposed plan unnecessarily trammels the rights of nonminorities. At issue in *Weber* was a training program from which the defendant hired its skilled craft employees. Pursuant to a collective bargaining agreement, the defendant had agreed to reserve fifty percent of the slots in the training program for minorities, effectively guaranteeing half of the promotions into the skilled craft positions to minorities. The Court concluded that:

> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program

> will be white. Moreover, the plan is a temporary measure; it is not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the labor force.

443 U.S. at 208-09, 61 L.Ed.2d at 492.

11. Here, the remedial promotions do not provide any remedy for African-Americans and Hispanic-Americans who failed the promotional tests at issue, although plaintiffs have presented evidence that the passing point of 70% correct is not job-related. This relief is quite limited, and is being granted on a one-time-only basis. The elimination of future test questions which are biased against persons of *any* race will provide some benefits to whites as well as to African-Americans and Hispanic-Americans. The relief is not expected to eliminate all substantial adverse impact against African-Americans and Hispanic-Americans in future tests for Sergeant and Lieutenant, but will merely reduce the degree of the disparate impact. Finally, the elimination of biased test questions will occur over a limited ten-year period of time, and the City will not face this constraint after that period of time.[29]

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29. Nothing in the proposed Consent Decree would limit the right of African-Americans and Hispanic-Americans to challenge promotional examinations after the expiration of the ten-year period, if such examinations then have substantial adverse impact against them.

12. This case involves a more conservative situation. Since the training program in *Weber* was the means by which unskilled workers were promoted to skilled craftworker positions, it served the same function as the Houston Police Department's remedial promotions, but the benefits of the program here are directed towards those African-Americans and Hispanic-Americans who were most likely to have been identifiable victims of the alleged past discrimination.[30] Instead of continuing remedial promotions into the future, as *Weber* approved, the proposed Consent Decree merely takes the much more limited step of reducing the degree of the adverse impact against African-Americans and Hispanic-Americans in promotional examinations for these ranks over the next ten years.

13. As was the case with *Weber*'s training program, the proposed promotions do "not require the discharge of white workers and their replacement with new [minority] hirees." Nor does the promotional plan create an absolute bar to the advancement of white employees since whites will continue to be promoted in substantial excess of their representation among the test takers. Similarly, "the plan is a temporary measure; it is not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance." 443 U.S. at 208, 61 L.Ed.2d at 492.

14. Indeed, for two reasons, the proposed Consent Decree is more protective of nonminorities than the plan approved in *Weber*. First, the training program in *Weber* set

30. The City defendants do not concede that there was any discrimination as to the tests challenged. It is not necessary for the Court to resolve this issue.

aside a percentage of slots *greater* than the percentage of minorities in the general community,[31] while the proposed Consent Decree in our case would only provide remedies which alleviate, but do not eliminate, the past and future disparate impact in question. Second, the proposed Consent Decree would empower the Police Department to reject unqualified minority candidates, as well as many other minority candidates, by continuing to use the 70% correct dividing line for passing and by continuing the use of rank-ordering. The *Weber* plan apparently contained no provision allowing such rejections. The availability of such rejections, many courts have held, is important to the validity of an affirmative action program. *E.g.*, *United States v. Paradise*, 480 U.S. 149, 177, 94 L.Ed.2d 203, 227, 107 S.Ct. 1053 (1987) ("The features of the one for one requirement and its actual operation indicate that it is flexible in application at all ranks. The requirement may be waived if no qualified black candidates are available.").

15. The proposed Consent Decree also passes muster under the most rigorous Constitutional standard, that of "strict scrutiny". The two best illustrations of the meaning of strict scrutiny in the affirmative action context are *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986), and *Sheet Metal Workers*. Specifically, *Wygant* contains the Supreme Court's most detailed analysis of the sort of evidentiary showing of prior discrimination necessary to demonstrate a compelling

31. The plan in *Weber* reserved for blacks half the available slots in the training program while blacks constituted only 39% of the local workforce.

government interest. *Sheet Metal Workers*, on the other hand, provides a list of factors relevant to assessing whether a plan is narrowly tailored to serve such an interest.

16. *Wygant* involved a challenge to an affirmative action plan in a public school system which provided that, independently of teacher seniority, layoffs could not result in a diminution of the proportion of minority teachers. In compliance with the plan, the defendant school was forced to lay off non-minority teachers with more seniority than minority teachers who continued to work. Justice Powell's plurality opinion and Justice O'Connor's concurring opinion disclose two components of the compelling-interest inquiry. First, they insist that only evidence of possible discrimination by the entity adopting the program can justify a racial preference. Second, they conclude that such remedial interests only become compelling when the agency in question possesses a certain quantum of evidence of that possible discrimination. The comments of both Justices are illuminating. Justice Powell reasoned:

> In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.
>
> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court

> by nonminority employees. . . . In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program.

476 U.S. at 277-78 (emphasis added). Justice O'Connor discusses the same issue in detail: her comments merit extended quotation.

> Of course, as Justice Powell notes, the public employer must discharge this sensitive duty with great care; in order to provide some measure of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted. Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

To be sure, such a conclusion is not unassailable. If a voluntary affirmative action plan is subsequently challenged in court by nonminority employees, those employees must be given the opportunity to prove that the plan does not meet the constitutional standard this Court has articulated. However, as the plurality suggests, the institution of such a challenge does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld. *See ante*, at 277-278, 90 L Ed 2d, at 270-271. In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear

> the ultimate burden of persuading the court that the Board's evidence did not support an *inference* of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

Id. at 291-93, 90 L.Ed.2d at 279-81 (emphasis added).

17. Plaintiffs have proven the disparate impact of the challenged examinations. Their expert testimony and other evidence have created substantial doubt as to the job-relatedness of the challenged tests. It is not necessary for the Court to resolve the question whether the challenged examinations were job-related. Plaintiffs have shown a sufficiently firm basis for the relief provided in the proposed Consent Decree.

18. That leaves only the issue of whether the proposed Consent Decree is "narrowly tailored" to achieve its compelling purpose. Much like the Title VII inquiry into whether a plan unnecessarily trammels the rights of nonminorities, the Court's analysis of the narrowly-tailored prong of strict scrutiny turns on several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact

of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. at 187, 94 L.Ed.2d at 233 (Powell, J., concurring).

19. These four factors will be discussed in reverse order. *First*, the impact of the proposed program on non-minorities is negligible. The plan neither displaces any non-minorities nor does it absolutely bar their advancement. *Weber*, 443 U.S. at 208, 61 L.Ed.2d at 492. *Second*, the plan calls only for the remedial promotions of minorities to a degree which alleviates but does not eliminate the disparate impact of the challenged tests, and for a reduction but not an elimination of such disparate impact in Sergeant and Lieutenant tests over the next ten years. The courts have upheld relief going much farther. *E.g.*, *United States v. City of Buffalo*, 721 F.Supp. 463, 468 (W.D.N.Y., 1989) (all disparate impact in continuing use of tests of doubtful validity enjoined). By allowing the Police Department to continue using a 70%-correct passing score and rank-ordering, the proposed Consent Decree allows the Police Department to reject unqualified African-American and Hispanic-American promotional candidates, as well as many qualified African-American and Hispanic-American promotional candidates. *Third*, remedial promotions are being made at only one time, and there is a ten-year limit on the reduction of further adverse impact. The proposed Consent Decree thus clearly is not designed to maintain a particular racial balance. *Fourth*, the plurality opinion in *Sheet Metal Workers*, 478 U.S. at 450-51, 92 L.Ed.2d at 372, explicitly acknowledges the potential necessity of plans going far beyond the limited provisions at issue, holding that "a district court may find it necessary to order interim hiring

or promotional goals pending the development of non-discriminatory hiring or promotion procedures." Similarly, in *Howard v. McLucas*, 871 F.2d at 1008-09, the Eleventh Circuit recently upheld a consent decree providing for remedial promotions, concluding that the program satisfied all of the factors noted above, including the necessity test:

> To evaluate the district court's determination that the promotional relief was necessary, "we must examine the purposes the [relief] was intended to serve." *Paradise*, 107 S.Ct. at 1067. The consent decree was entered into to ensure the expeditious equal promotion of blacks at Warner Robins and remedy the effects of years of discrimination. . . .
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> * * *
>
> The intervenors . . . argue that the promotional relief was unnecessary because other remedial alternatives were available. According to the intervenors, the relief could have been spread out over a longer period of time and double promotions (i.e., promoting off both the regular register and the special promotion register) could have been used. These alternatives, however, are not feasible because they do not place the plaintiffs in their rightful place or do not do so as expeditiously. . . . The government's efforts to eliminate the effects of past discrimination would have been thwarted unless 240 qualified plaintiffs were promoted. . . .

Precisely the same reasoning applies herein.

20. The elimination of biased test items — those which have substantial adverse impact against whites, or against blacks, or against Hispanics, and which are not related to job performance — potentially benefits the members of all racial groups and will have the result of making the test more closely related to performance of the jobs in question. These provisions of the Consent Decree do not unnecessarily trammel the interests of nonminority officers.

21. The limited race-conscious remedies provided in the proposed Consent Decree are lawful and appropriate under both Title VII of the Civil Rights Act of 1964 and the Constitution.

C. *The Showing of Disparate Impact Caused by the Challenged Tests*

22. The HPPU argues that *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989), requires that plaintiffs prove adverse impact on a question-by-question basis, or that they prove adverse impact as to the particular questions they have challenged. This is incorrect. *Wards Cove* involved subjective practices, not tests, and the Court has never adopted the kind of approach to tests suggested by HPPU. No testing case after *Wards Cove* has suggested the kind of limitation proposed by HPPU. Indeed, the Civil Rights Act of 1991[32] expressly states that decisionmaking practices are to be analyzed as one practice where the "elements" of the process "are not capable of separation for

32. Pub.L. 102-166, 105 Stat. 1071, 1074.

analysis".[33] Sen. Danforth, the principal author of the bill, placed an Interpretive Memorandum in the Congressional Record stating:[34]

> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

This is not ordinary legislative history; Congress has explicitly made it the definitive and exclusive interpretation of this provision of the Act. Sec. 105(b) of the Act mandates this extraordinary treatment:

> (b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of the Act that relates to Wards Cove — Business necessity/cumulation/ alternative business practice.

105 Stat. 1075.

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33. Sec. 703(k)(1)(B), 42 U.S.C. § 2000e-2(k)(1)(B).

34. 137 Cong.Rec. S 15276 (daily ed., Oct. 25, 1991).

23. The Elder and Clark objection to basing determinations of adverse impact upon test-takers, rather than upon all persons eligible to take the test even if they refuse to compete for promotion, has no basis in law. *Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir., 1986) (the question of adverse impact "is whether the plaintiffs have shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from the pool of *applicants* . . .") (emphasis supplied); *Davis v. Yazoo County Welfare Dept.*, 942 F.2d 884, 889 (5th Cir. 1991) (after *Wards Cove*, adverse impact determined by looking to the number hired from the applicant pool); *see also Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir. 1989) (adverse impact generally based on comparing selection rates based on actual applicants).

24. The objectors seem to read *Atonio* as disapproving all statistical evidence in discharging plaintiffs' burden of proving the disparate impact of the challenged selection procedure. The statistical comparison in *Atonio* was rejected because the comparison was improper, not because statistical proof was improper. Unlike the case at bar, *Atonio* involved a "nonsensical" comparison between the percentage of unqualified and unskilled cannery workers who were members of minority groups and the percentage of skilled and highly qualified "accountants, managers, boat captains, electricians, doctors, and engineers" who were minorities. 104 L.Ed.2d at 748. Here, by contrast, each officer who took one of the challenged tests met the requirements established by the City and the State to compete for promotion to the rank in question. They were all qualified to be evaluated by the prescribed promotion procedure.

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25. Comparisons between the number of otherwise qualified test-takers of each race and the numbers of persons of each race who were promoted are similar to analyses of racial disparities in applicant-flow among otherwise qualified candidates. Nothing in *Atonio* disapproves such analyses. Indeed, bearing in mind that there were no applicant-flow statistics in *Atonio*, and that there could not have been any untainted applicant-flow statistics there because one of the challenged practices was the existence of two separate recruiting and hiring channels, the Court went out of its way to emphasize the importance of applicant/hire ratios as evidence of discrimination. The Court suggested comparing the proportion of new hires in medical and office worker jobs who were nonwhite to the proportion of applicants for those jobs who were nonwhite. 104 L.Ed.2d at 748. The Court referred to the possibility that discrimination might produce a dearth of qualified nonwhite applicants as undermining the conclusions to be drawn from applicant/hire ratios. 104 L.Ed.2d at 748 note 7. It referred to the question whether "the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite". 104 L.Ed.2d at 749. Finally, the Court referred to the same kind of comparison again at 104 L.Ed.2d at 749 note 8.

26. The conclusion that any selection practice caused discrimination is necessarily inferential, as the *Watson* plurality emphasized:

> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of

> a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they *raise such an inference of causation.*

487 U.S. at 994-95, 101 L.Ed.2d at 845 (emphasis added). Rather than rejecting statistics as evidence it is clear that the *Watson* plurality and now the *Atonio* majority view statistical proof as the chief foundation on which an inference of causation may be built.

27. The Court of Appeals for this Circuit has not construed *Wards Cove* as requiring the disapproval of disparate-impact showings based on selection rates. In *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 562 and note 38 (5th Cir., 1988) (*Bernard IV*), the court approved showings of disparate impact based on substantial racial disparities in passing rates or in selection rates. This holding was re-affirmed after *Wards Cove* in *Bernard VI*, 890 F.2d 735, 742 (5th Cir., 1989), *cert. den.*, 497 U.S. 1003, 111 L.Ed.2d 748, 110 S.Ct. 3237 (1990).

28. The Elder and Clark suggestion that the Court defer ruling on whether there is an adequate showing of disparate impact until after the Supreme Court's decision next Term as to whether the Civil Rights Act of 1991 applies to pre-Act cases is purely dilatory. Neither the 1991 Act nor *Wards Cove* provide any possible support for including

persons refusing to compete for promotions in a disparate-impact calculation. Elder and Clark have tried to shoehorn part of *Wards Cove* into this case *by themselves making a claim of disparate impact which plaintiffs and the City have not made, pointing out that Wards Cove does not allow this Elder and Clark showing, incorrectly claiming that the 1991 Civil Rights Act overrules Wards Cove on this point, and then asking this Court to defer action until the nation learns whether the fictitious overruling applies to pending cases.* This is an ingrown toenail of a bootstrap argument, and it will be a long time before the Court sees its like again.

29. The Elder and Clark objection that the parties are somehow not competent to recognize adverse impact without an independent audit has no basis in law.

30. All of the objections to the showings of disparate impact herein are based on the faulty assumption that plaintiffs and the City are powerless to recognize adverse impact unless they have absolutely perfect evidence. This is completely incorrect. Even in contested litigation, the plaintiffs are not required to introduce perfect evidence, covering every theoretically possible combination, permutation, and speculation the defendant may toss into the ring. *Dothard v. Rawlinson*, 433 U.S. 321, 329-31, 53 L.Ed.2d 786, 797-98, 97 S.Ct. 2720 (1977). This holding of *Dothard* was expressly quoted and approved in Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 996, 101 L.Ed.2d 827, 846, 108 S.Ct. 2777 (1988). The statistical discussion in *Dothard* was also cited with approval in *Atonio*. 104 L.Ed.2d at 747 note 6. *And see Lewis v. Bloomsburg Mills*, 773 F.2d 561, 576 (4th Cir., 1985),

rejecting speculative attacks on an otherwise credible statistical showing. This is still good law. *Allen v. Seidman*, 881 F.2d 375, 380 (7th Cir., 1989); *EEOC v. General Telephone Co. of the Northwest*, 885 F.2d 575, 582-83 (9th Cir., 1989).

31. Moreover, this is not contested litigation. The relevant standard for approval of the Consent Decree is whether the City had an adequate basis for determining that relief was appropriate. As discussed above, the City is not required to admit a *prima facie* case as a condition of settlement. The manifest racial imbalance in promotion rates was an ample basis for the City's entering into the Consent Decree.

32. Relatively small numbers of African-Americans or Hispanic-Americans took some of the challenged examinations. Small sample sizes sometimes make it difficult to detect statistical significance in an observed racial disparity. In *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 769 (5th Cir.), *cert. den.*, 464 U.S. 991, 78 L.Ed.2d 679, 104 S.Ct. 482 (1983), the court of appeals stated it was "[c]ognizant of the lessened probative value of statistical evidence where the sample size is small, due to the incremental increase in the possibility of sampling error". The reliability of standard-deviation analyses "diminishes in ways probably not susceptible of precise handling by courts as the binomial distribution sample diminishes in size." *EEOC v. American National Bank*, 652 F.2d 1176, 1193 note 12 (4th Cir., 1981), *cert. den.*, 459 U.S. 923, 74 L.Ed.2d 186, 103 S.Ct. 235 (1982). In both of these case, the Fourth and Fifth Circuits cautioned that two competing considerations must be kept in mind: the danger of unfairness to the

employer in resting inferences of discriminatory employment practices on proof involving small numbers of employment decisions, and the danger of unfairness to the plaintiffs in making it so difficult to prove discrimination that they cannot make out their case where small samples are involved. The Fourth Circuit, recommended aggregating job categories in order to obtain larger sample sizes. 652 F.2d at 1194.

33. In *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir., 1983), the court of appeals reversed a finding of nondiscrimination predicated on a finding that the sample of persons taking the challenged Personnel Board test was too small for it to draw any conclusion on adverse impact. The court of appeals directed the district court to consider the aggregated pass/fail data for 29 examinations administered by the Personnel Board.

34. The obvious remedy for fragmented hiring samples involving small numbers of hiring decisions is to use larger units of time for analysis. In *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336 note 17 (4th Cir., 1983), *cert. den.*, 466 U.S. 951, 80 L.Ed.2d 539, 104 S.Ct. 2154 (1984), the court stated:

> If possible, it is highly preferable to examine the statistical data for the time period in combined form, rather than year by year. Combined data is more likely to demonstrate the "pattern or practice" of defendant's policies, whether discriminatory or not. Moreover, by increasing the absolute numbers in the data, chance will more readily be excluded as a cause of any disparities found. For example,

> if a coin were tossed ten times in the first day and came up heads four times, no one would think the coin was biased (0.632 standard deviations), but if this same ratio occurred for a total of 10,000 tosses, of which 4,000 were heads, the result could not be attributed to chance (20 standard deviations).

In *Payne v. Travenol Laboratories*, 673 F.2d 798, 820-21 notes 32, 33, and 34 (5th Cir.), *cert. den.*, 459 U.S. 1038, 74 L.Ed.2d 605, 103 S.Ct. 451 (1982), the court of appeals relied on hiring data aggregated over multiple years. Unless a year-by-year approach demonstrates "an ever-decreasing discriminatory impact", the Ninth Circuit has also held that aggregated data are preferable to year-by-year data and "are the most probative". *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 833 F.2d 1334, 1339 note 7 (9th Cir., 1987), *cert. den.*, 487 U.S. 1210, 101 L.Ed.2d 894, 108 S.Ct. 2857 (1988).

35. Plaintiffs have met their burden of proving that the challenged examinations had substantial adverse impact against African-Americans and against Hispanic-Americans. The objections to this proof are without merit.

D. *The Burden of Producing Evidence of Job-Relatedness*

36. Under *Atonio*, the defendant has the burden of producing admissible evidence that a selection practice causing disparate impact is job-related. When this burden of production is discharged, plaintiffs have the burden of persuasion that the practice is not job-related.

Appendix D

37. *Atonio* emphasized that the employer's burden is substantial: it has to produce evidence that "a challenged practices serves, *in a significant way*, the legitimate employment goals of the employer." The employer's showing has to permit "reasoned review". 104 L.Ed.2d at 752. The Court held that the language of its prior cases was misinterpreted as requiring the employer to bear the burden of persuasion, but what is significant is that it does not overrule those cases or disapprove their results. Instead, it cites those cases with approval. *Atonio* provides no reason to believe that the standards it clarifies would have led to decisions for the employer in *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971), in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975), or in *Dothard v. Rawlinson*, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977).

38. This is significant. *Griggs* rejected the explanation of a company vice-president that the challenged requirements "generally would improve the overall quality of the work force", because the explanation did not meet the standards of the EEOC Guidelines. 401 U.S. at 431, 433-36, 28 L.Ed.2d at 164, 165-67. *Albemarle Paper* rejected the validation study of a psychologist, because it did not meet the standards of the EEOC Guidelines. 422 U.S. at 426-36, 45 L.Ed.2d at 301-07. *Dothard* rejected a showing that the height and weight requirement for correctional counselors was correlated with strength, because it was not specific enough to show that the correlation was with the *specific* amount of strength required, and thus it did not meet the requirements of the Guidelines. 433 U.S. at 331-32, 53 L.Ed.2d at 798-99.

39. Plaintiffs have pointed out a number of problems in the City's production of evidence of job-relatedness even in the *Houston Chapter* litigation in which the City engaged in a full-blown validation study. Even if the same were done here, plaintiffs would urge that, if this had been the trial of the case, the City should be deemed not to have satisfied its burden of production. For purposes of granting or withholding final approval to the proposed Consent Decree, the Court need not resolve this question. It is sufficient at the present time that the Court concludes that plaintiffs have raised substantial doubt as to the job-relatedness of the challenged examinations.

40. Under the Civil Rights Act of 1991, the City has the burden of persuasion on job-relatedness. The restoration of the traditional allocation of the burden of persuasion in disparate-impact cases is a procedural change, which under the law of the Fifth Circuit is applicable to pending cases. *Landgraf v. USI Film Products*, 968 F.2d 427, 433 (5th Cir., 1992), *cert. granted* (*dictum*) ("We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted."). The court declined to decide this precise question in *Johnson v. Uncle Ben's*, 965 F.2d 1363, 1372 (5th Cir., 1992), *petition for certiorari pending.*

E. *The Proof on the Issue of Job-Relatedness*

41. If a test does not really predict meaningful differences in performance among those who pass, it can be unlawful to place the candidates in rank order because this usually aggravates the adverse impact of the test. *E.g.*, *Fire*

fighters Institute v. City of St. Louis, 616 F.2d 350, 357 (8th Cir., 1980), *cert. den. sub nom City of St. Louis v. United States*, 452 U.S. 938, 69 L.Ed.2d 951, 101 S.Ct. 3079 (1981) ("Because these test results were used to rank candidates, St. Louis must prove that the results are associated with different levels of job performance."); *Guardians Ass'n of New York City Police Department v. Civil Service Commission*, 630 F.2d 79, 103 (2nd Cir., 1980), *cert. den.*, 452 U.S. 940, 69 L.Ed.2d 954, 101 S.Ct. 3083 (1981) ("If test scores produce disparate racial results, an employer who wants to use rank-ordering of the scores for hiring decisions faces a substantial task in demonstrating that rank-ordering is sufficiently justified to be used. But the task is by no means impossible."); *Ensley Branch of N.A.A.C.P. v. Seibels*, 616 F.2d 812, 822 (5th Cir.), *cert. den. sub nom Personnel Board of Jefferson County v. United States*, 449 U.S. 1061, 66 L.Ed.2d 603, 101 S.Ct. 783 (1980) ("Use of a test for such ranking purposes, rather than as a [*Washington v.*] *Davis*-like device to screen out candidates without minimum skills, is justified only if there is evidence showing that those with a higher test score do better on the job than those with a lower test score."). The *Uniform Guidelines* require specific evidence justifying rank-ordering. 29 C.F.R. § 1607.5(G).

42. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975) held that findings of a statistically significant relationship between test scores and some measure of employee performance were not enough by themselves to justify use of a test with disparate impact. The "measure" in that case was "subjective supervisorial rankings", still the most commonly used "criterion of perfor-

mance" in test validation studies[35] and the "criterion of performance" used herein. The Court held that there had to be proof that the measure of employee performance was stable and focused, and that this "measure" was itself "sufficiently related to the Company's legitimate interest in job-specific ability", 422 U.S. at 433, 45 L.Ed.2d at 305.

43. Similarly, the *Uniform Guidelines* require that the measure of job performance represent "important or critical work behavior(s) or work outcomes."[36] It is not permissible just to single out isolated parts of job performance for purposes of a validation study.[37]

44. Plaintiffs have presented, through evidence of questions of doubtful job-relatedness implicating the carefulness with which the overall tests were constructed and through evidence from the *Houston Chapter* case, evidence creating substantial doubt whether such differences in performance as are measured by the challenged examinations are large enough to have any practical utility, and whether the types of tests challenged make so many mistakes in predicting the most successful performance and the least successful performance that they ought not to be considered reliable. It is not necessary for the Court to resolve these questions.

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35. Normally, most of the supervisors rating employees are white.

36. 29 C.F.R. § 1607.14(B)(3).

37. 29 C.F.R. § 1607.14(B)(6), and -(7).

45. Plaintiffs have demonstrated a firm basis in fact for the conclusion of the City defendants and of the other partes that remedial action is warranted.

F. *The Power of the Court to Override State or Local Laws in Providing a Remedy in a Title VII Case*

46. There can be little doubt that the Court has the power to enter an Order overriding provisions of State or local law where necessary to provide an appropriate remedy for a violation of Federal law, or in settlement of a case in which plaintiffs are alleging a violation of Federal law. Nevertheless, the Court must take care that the provisions of State or local law be overridden only insofar as this is reasonable and appropriate to the remedy in question. *United States v. City of Chicago*, 549 F.2d 415, 437-38 (7th Cir.), *cert. den.*, 434 U.S. 875, 54 L.Ed.2d 155, 98 S.Ct. 225 (1977).

47. As the above findings make clear, the relief herein was shaped so as to impinge as little as possible upon the provisions of State law, and to preserve the merit selection policies underlying the State law.

G. *Other Objections*

48. Some objectors have complained that the settlement does not provide relief for promotional examinations administered before 1982. The compromise proposed by Mr. Seymour and adopted by the Court bars relief for such examinations. As is true with many compromises, it gives up something in order to get something else. Here, the "something else" was the ability to challenge tests going back to 1982. In light of the failure of prosecution in the *Kelley*

action, it was clear that the Court had the equitable power to impose a reasonable limit on the City's exposure. The limit was reasonable.

49. Moreover, the compromise took away nothing from the *Kelley* plaintiffs that they could not themselves have safeguarded by prosecuting their case more diligently. When their own actions and those of their counsel were responsible for the loss of these claims, they cannot hold up the settlement of the claims that the *Edwards* plaintiffs managed to salvage by appealing to equity.

50. Some objectors have complained that they should receive remedial promotions because they are white, or Asian-American, and they also took and passed some of the challenged examinations but were not promoted. However, these examinations did not result in adverse impact against whites; quite the contrary, whites were favored by the examinations. Nor did the tests result in disparate impact against Asian-Americans. There is no basis for any relief for whites or Asian-Americans under Title VII, and this objection must be denied. *Berkman v. City of New York*, 705 F.2d 584, 597 note 15 (2nd Cir., 1983) (male applicants seeking relief in a gender discrimination lawsuit brought by women); *Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F. 2d 767, 772-73 (2nd Cir., 1975), *cert. den.*, 427 U.S. 911, 49 L.Ed.2d 1203, 96 S.Ct. 3198 (1976) (white employee seeking relief in a racial discrimination lawsuit brought by blacks).

51. Some objectors have complained that remedial promotions will interfere with their ability to be promoted

from regular examination registers in the future. The proposed Consent Decree doubles the life of the 1992 Lieutenant and 1993 Sergeant examinations, greatly increasing the opportunities of the persons on those lists to be promoted before the expiration of those lists. Their rights are enhanced, not diminished, by the settlement.

52. Other officers are concerned that their rights may be diminished on future registers compiled as a result of new examinations which have as yet neither been developed, announced, or administered, and that this interferes with their expectation of a promotion in the event that they compete for these promotional examinations not yet in existence and score high enough to be reached. They, too, will have a greater opportunity of promotion because of the doubling of the life of these registers.

53. Moreover, the interests of these objectors are too remote and speculative to outweigh the interests of those firefighters on these promotional registers whose expectations of promotion had become quite definite. *Johnson v. Transportation Agency*, 480 U.S. at 638, 94 L.Ed.2d at 635 ("denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.") (footnote omitted); *Vulcan Pioneers v. New Jersey Dept. of Civil Service*, 832 F.2d 811, 816-17 (3rd Cir., 1987) ("Furthermore, candidates not promoted still retain their jobs and remain eligible to compete for these very same promotions when the new examination is

administered. Any burdens placed on these candidates simply do not rise to an impermissible level.") (footnote omitted).[38]

54. The proposed Consent Decree is supported by plaintiffs' showing of an adequate predicate for the relief it provides. It is fair and reasonable. The Court hereby finally approves the Consent Decree.

Signed on March 25th, 1993, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

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38. *Vulcan Pioneers* struck down a promotional test for firefighters quite similar to that used by the City.